(13)

No. 99-1865-ATX Title: Alfred Smallwood, et al., Appellants
v.
Martin Cromartie, et al.

Docketed: May 23, 2000 Court: United States District Court for the Eastern District of North Carolina

Vide:
99-1864

Entry	Date	Proceedings and Orders
	Mar 13 2000	Application (99A757) for a stay pending appeal from the United States District Court for the Eastern District of North Carolina, submitted to The Chief Justice.
	Mar 16 2000	Application (99A757) referred to the Court by the Chief Justice.
	Mar 16 2000	Application (99A757) granted by the Court.
	Apr 25 2000	Application (99A880) to extend the time to file a jurisdictional statement on appeal from May 12, 2000 to May 19, 2000, submitted to The Chief Justice.
	Apr 27 2000	Application (99A880) granted by the Chief Justice extending the time to file until May 19, 2000.
	May 19 2000	Statement as to jurisdiction filed. (Response due June 22, 2000)
	May 25 2000	Motion of appellees Martin Cromartie, et al. to dismiss or affirm filed. VIDED.
	Jun 6 2000	DISTRIBUTED for Conference of June 22, 2000
	Jun 26 2000	PROBABLE JURISDICTION NOTED. The case is consolidated with No. 99-1864, and a total of one hour is allotted for oral argument. SET FOR ARGUMENT November 27, 2000. **********
	Jul 26 2000	Order extending time to file opening brief on the merits to and including August 21, 2000.
	Aug 2 2000	Order further extending time to file the joint appendix and appellants' briefs on the merits to and including September 8, 2000.
	Sep 6 2000	Brief amicus curiae of American Civil Liberties Union filed. VIDED.
	Sep 7 2000	Joint appendix filed.
	Sep 7 2000	Joint appendix in two volumes.
	Sep 8 2000	Brief of appellants James B. Hunt, Jr., et al. filed. VIDED.
	Sep 8 2000	Brief of appellants Alfred Smallwood, et al. filed.
	Sep 8 2000	Brief amicus curiae of United States filed. VIDED.
	Oct 2 2000	Application (A00-280) for leave to file appellees' brief on the merits in excess of the page limitation, submitted to The Chief Justice.
	Oct 3 2000	(A00-280) Application granted by The Chief Justice.
	Oct 4 2000	Motion of the Smallwood appellants for divided argument filed.
	Oct 6 2000	Brief of appellees Martin Cromartie, et al. filed. VIDED.
	Oct 24 2000	CIRCULATED.
	Nov 3 2000	Motion of Smallwood appellants for divided argument DISTRIBUTED.

2pp

No. 99-1865-ATX

Entry	Date	Proceedings and Orders
	Nov 3 2000	Record filed.
	Nov 6 2000	Motion of the Smallwood appellants for divided argument GRANTED.
	Nov 8 2000	Reply brief of appellants James B. Hunt, Jr., Governor of NC, et al. filed. VIDED.
	Nov 8 2000	Reply brief of appellants Alfred Smallwood, et al. filed.
	Nov 15 2000	Two large maps lodged by appellees for use in oral argument.
	Nov 27 2000	ARGUED.

Supreme Court, U.S.
FILED

No. 99- 991865 MAY 19 2000

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES B. HUNT, JR., *et al.*,
Appellants,

and

ALFRED SMALLWOOD, *et al.*,
Appellant-Intervenors,

v.

MARTIN CROMARTIE, *et al.*,
Appellees.

On Appeal from United States District Court for the Eastern District of North Carolina

JURISDICTIONAL STATEMENT ON BEHALF OF THE SMALLWOOD APPELLANTS

ELAINE R. JONES
DIRECTOR-COUNSEL

NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street
Suite 1600
New York, NY 10013
(212) 219-1900

TODD A. COX*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 Eye Street, N.W.
10th Floor
Washington, D.C. 20005
(202) 682-1300

ADAM STEIN
Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

**Counsel of Record*

Attorneys for Appellant-Intervenors

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

40PP

QUESTIONS PRESENTED

1. Is a state congressional district subject to strict scrutiny under the Equal Protection Clause simply because it is slightly irregular in shape and contains a higher proportion of minority voters than adjacent districts, when (a) it is not a majority-minority district, (b) it complies with all of the race-neutral districting criteria the state adopted to govern the design of the entire apportionment plan, and (c) there is neither direct nor compelling evidence that race was the predominant factor in its design?

2. In a challenge to a state congressional district, brought under the jurisprudence established by this Court in *Shaw v. Reno* and its progeny, is an inference drawn from the challenged district's shape and racial demographics, standing alone, sufficient to support a finding for the plaintiffs on the contested issue of the predominance of racial motives in the district's design, when it is directly contradicted by the testimony of the legislators who drew the district and evidence that the district conforms with the state's articulated redistricting criteria?

3. Following a finding of unconstitutionality in a challenge to a state congressional district, brought under the jurisprudence established by this Court in *Shaw v. Reno* and its progeny, is it an abuse of discretion for a district court to order the state to conduct redistricting immediately when redistricting would cause disruption to ongoing election processes and when redistricting will occur anew following the imminent release of the 2000 Census data?

PARTIES TO THE PROCEEDINGS

Actual parties to the proceeding in the United States District Court were:

(1) James B. Hunt, Jr., in his capacity as Governor of the State of North Carolina, Dennis Wicker in his official capacity as Lieutenant Governor of the State of North Carolina, Harold Brubaker in his official capacity as Speaker of the North Carolina House of Representatives, Elaine Marshall in her official capacity as Secretary of the State of North Carolina, and Larry Leake, S. Katherine Burnette, Faiger Blackwell, Dorothy Presser and June Youngblood in their capacity as the North Carolina State Board of Elections, defendants, appellants herein,

(2) Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins, defendant-intervenors, appellant-intervenors herein,

(3) Martin Cromartie, Thomas Chandler Muse, R.O. Everett, J.H. Froelich, James Ronald Linville, Susan Hardaway, Robert Weaver and Joel K. Bourne, plaintiffs, appellees herein.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The Challenge to the Current Plan 2

B. Appeal of the Summary Judgment Decision 6

C. District Court Trial on Remand 8

D. The District Court Opinion and the Current Appeal 12

REASONS FOR NOTING PROBABLE JURISDICTION 16

I. The Court Erred by Effectively Holding that Race Consciousness Triggers "Strict Scrutiny" 17

II. The District Court Erred by Failing to Determine Whether the State had a Compelling Justification for Creating a Narrowly Tailored District 12 22

III. The District Court Erred in Ordering Redistricting on the Eve of the Post-2000 Redistricting Cycle 24

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Page

Abrams v. Johnson,
521 U.S. 74 (1997) 19

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 6

Bush v. Vera,
517 U.S. 952 (1996) ..... *passim*

Cardona v. Oakland Unified School District,
785 F. Supp. 837 (N.D. Cal. 1992) 25

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2000) 20

Clark v. Calhoun County,
88 F. 3d. 1393 (5th Cir. 1996) 20

Cosner v. Dalton,
522 F. Supp. 350 (E.D. Va. 1981)) 25

DeWitt v. Wilson,
856 F. Supp. 1409 (E.D. Cal. 1994),
aff'd, 515 U.S. 1170 (1995) 20, 22

Diaz v. Silver,
932 F. Supp. 462 (E.D.N.Y. 1996) 25

Dickinson v. Indiana State Election Bd.,
933 F.2d 497 (7th Cir. 1991) 27

Ely v. Klahr,
403 U.S. 108 (1971) 26

Gingles v. Edmisten,
590 F. Supp. 345 (E.D.N.C. 1984),
aff'd in part and rev'd in part, sub. nom.,
Thornburg v. Gingles, 478 U.S. 30 (1986) 11

Hunt v. Cromartie, 526 U.S. 541 (1999) ..... *passim*

King v. State Board of Elections,
522 U.S. 1087 (1998) 19

Lawyer v. Department of Justice,
521 U.S. 567 (1997) 19, 22

Maxwell v. Foster,
No. 98-1378 (W.D. La. Nov. 24, 1999) 26, 27

Meeks v. Anderson,
229 F. Supp. 271 (D. Kan. 1964) 25

Miller v. Johnson,
515 U.S. 900 (1995) ..... *passim*

Republican Party of Shelby County v. Dixon,
429 U.S. 934 (1976) 26

Republican Party of Virginia v. Wilder,
774 F. Supp. 400 (W.D. Va. 1991) 25

Reynolds v. Sims, 377 U.S. 533 (1964) 25, 26

Scott v. United States,
920 F. Supp. 1248 (M.D. Fla. 1996),
aff'd sub. nom., Lawyer v. Department of Justice, 521 U.S. 567 (1997) 22

Shapiro v. Maryland,
336 F. Supp. 1205 (D. Md. 1972) 25

Shaw v. Hunt,
517 U.S. 899 (1996) ..... *passim*

Shaw v. Hunt,
No. 92-202-CIV-5-BR (E.D.N.C.
September 12, 1997) 4, 10

Shaw v. Hunt,
861 F. Supp. 408 (E.D.N.C. 1994),
rev'd, 517 U.S. 899 (1996) 1

Shaw v. Reno,
509 U.S. 630 (1993) ..... *passim*

Shaw v. Reno,
808 F. Supp. 461 (E.D.N.C. 1992) 1

Sincock v. Roman,
233 F. Supp. 615 (D. Del. 1964) 25

Theriot v. Parish of Jefferson,
185 F.3d 477 (5th Cir. 1999) 20

Thornburg v. Gingles,
478 U.S. 30 (1986) 11

United States v. Hays,
515 U.S. 737 (1995) 18

Watkins v. Mabus,
502 U.S. 954 (1991) 26

Wilson v. Eu,
1 Cal. 4th 707, 823 P.2d 545,
4 Cal. Rptr.2d 379 (1992) 20

STATUTES & RULES

28 U.S.C. § 1253 2

42 U.S.C. § 1973 ..... 15, 17

42 U.S.C. § 1973c 4

1997 N.C. Sess. Laws, Ch. 11 1

JURISDICTIONAL STATEMENT ON BEHALF OF THE SMALLWOOD APPELLANTS

Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins ("Smallwood Appellants"), white and African-American citizens and registered voters residing in either North Carolina's First or Twelfth Congressional District, appeal from the final judgment entered by the three-judge United States District Court for the Eastern District of North Carolina on March 8, 2000, which declares that the Twelfth Congressional District of North Carolina's 1997 congressional reapportionment plan, 1997 N.C. Sess. Laws, Ch. 11 ("1997 Remedial Plan"), violates the Fourteenth Amendment to the United States Constitution and enjoins further elections under that plan.

OPINIONS BELOW

The March 7, 2000 opinion of the three-judge district court is unreported and appears in the Appendix to the Jurisdictional Statement on Behalf of the State of North Carolina ("NC. J.S. App.") at 1a. The district court's final judgment, entered March 8, 2000, is unreported and appears at NC. J.S. App. at 71a. Previous decisions of earlier phases of this and related litigation are reported at *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993); *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994); and *Shaw v. Reno*, 808 F. Supp. 461 (E.D.N.C. 1992).

JURISDICTION

The judgment of the court below was entered on March 8, 2000. The Smallwood Appellants filed their notice of appeal to this Court on March 13, 2000. Appendix to the

Jurisdictional Statement on Behalf of the Smallwood Appellants at 1a. On April 27, 2000, the Chief Justice extended the time within which to docket the appeal in this case to and including May 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment, reproduced at NC. J.S. App. at 73a.

STATEMENT OF THE CASE

A. The Challenge to the Current Plan

This case is a challenge to the 1997 Remedial Plan, which is the third congressional redistricting plan enacted by the North Carolina General Assembly since the 1990 Census. This Court's ruling in *Shaw v. Hunt*, 517 U.S. 899 (1996), concerned the second congressional redistricting plan enacted by the North Carolina legislature following the 1990 Census ("1992 Plan").[1] In *Shaw*, this Court held that the 1992 Plan was unconstitutional because the location and configuration of District 12 violated the equal protection rights of some of the plaintiffs in the action.

---

[1]The first post-1990 Census North Carolina congressional reapportionment plan, enacted in 1991, contained one majority-African-American district that was 55.69 percent African-American in total population and 52.18 percent African-American in voting age population. This Court discussed the history of the first plan in *Shaw v. Reno*, 509 U.S. 630 (1993) and *Shaw v. Hunt*, 517 U.S. 899 (1996). The second post-1990 Census reapportionment plan, enacted in 1992, contained two majority-African-American districts (the First and Twelfth Congressional Districts), but the Twelfth Congressional District was held unconstitutional in *Shaw v. Hunt*.

Shaw, 517 U.S. at 902.

On July 3, 1996, following the decision of this Court in *Shaw v. Hunt*, three residents of Tarboro, North Carolina, Appellees herein, filed the complaint in this action (*Cromartie v. Hunt*), challenging District 1 in North Carolina's 1992 Plan on the ground that it violated their equal protection rights because race predominated in the drawing of the district. A stay of that action was entered pending the resolution of the remand proceedings in *Shaw v. Hunt*.

On July 9, 1996 the same Tarboro residents joined the original plaintiffs in *Shaw* in filing an Amended Complaint in *Shaw*, raising a similar challenge to and asserting the same claims against the First Congressional District as they raised in *Cromartie v. Hunt*. On July 11, 1996, the members of the Smallwood Appellant group (three voters from the First District and six voters from the Twelfth District) sought to intervene in the *Cromartie* suit as defendants.[2]

Following this Court's remand in *Shaw v. Hunt*, the North Carolina General Assembly convened to develop a redistricting plan to remedy the constitutional infirmities found by this Court. On March 31, 1997, the North Carolina General Assembly enacted the 1997 Remedial Plan and submitted it to the three-judge court in *Shaw v. Hunt*, No. 92-202-CIV-5-BR (E.D.N.C.). The State also submitted the plan for preclearance by the United States Department of Justice pursuant to Section

---

[2]The Smallwood Appellants also participated fully, as intervenors, in *Shaw v. Hunt* in the trial court and in this Court, including in the remedial proceedings which resulted in the approval of the 1997 Remedial Plan that is the subject of the present proceedings in this Court. *See infra.* p. 4.

5 of the Voting Rights Act, 42 U.S.C. § 1973c. On June 9, 1997, the Department of Justice precleared the plan. *See* NC. J.S. App. at 316a (*Shaw v. Hunt,* No. 92-202-CIV-5-BR, Memorandum Opinion (E.D.N.C. September 12, 1997)). On September 12,1997, the three-judge district court in *Shaw v. Hunt* unanimously approved the 1997 Remedial Plan as an adequate remedy for the specific constitutional violation found by the Supreme Court in *Shaw v. Hunt*. NC. J.S. App. at 312a. A map of the 1997 Remedial Plan is reproduced at NC. J.S. App. at 75a. The three-judge court then dismissed the case after Appellees Cromartie and Muse, who were also plaintiffs in *Shaw v. Hunt*, chose not to present their claims that the 1997 Remedial Plan was unconstitutional to the *Shaw* three-judge court.

The *Cromartie* three-judge court lifted its stay of proceedings on October 17, 1997. On the same day, two of the three original plaintiffs, along with four residents of District 12, filed an amended complaint in the *Cromartie* action, challenging the 1997 Remedial Plan as a violation of the Equal Protection Clause and still seeking a declaration that District 1 in the 1992 Plan is unconstitutional. Within the time allowed for answering that amended complaint, the Smallwood Appellants filed a renewed motion to intervene as defendants.

On March 31, 1998, the court below heard arguments on cross-motions for summary judgment and on the *Cromartie* plaintiffs' request for preliminary injunction.[3] On April 3, 1998,

[3]At the time of this hearing, the district court had not ruled on the motions to intervene of the Smallwood Appellants which had then been pending for over twenty months and four months, respectively. The court issued its permanent injunction and granted summary judgment without

the three-judge United States District Court for the Eastern District of North Carolina issued an order granting summary judgment to plaintiffs, declaring North Carolina's Twelfth Congressional District unconstitutional, permanently enjoining elections under the 1997 Remedial Plan, and ordering the State of North Carolina to submit a schedule for the General Assembly to adopt a new redistricting plan and to hold elections under that plan.[4] On April 14, 1998, the district court issued its opinion explaining its April 3, 1998 order.[5] NC. J.S. App. at 243a.

ruling on these unopposed motions or holding a hearing on intervention. In fact, the district court refused to allow counsel for the Smallwood Appellants an opportunity to bring the motion to intervene before it and expressly denied counsel for the Smallwood Appellants an opportunity to speak at the hearing.

[4]Although the court had not yet released an opinion, the State of North Carolina moved for a stay of the injunction pending appeal. The district court denied this motion. The State then filed an application with this Court for a stay pending appeal, and the Smallwood Appellants filed an *amicus curiae* memorandum in this Court in support of the application. This Court denied the request for a stay on April 13, 1998, with Justices Stevens, Ginsburg, and Breyer dissenting.

[5]On May 26, 1998, with their two prior unopposed intervention motions still pending, the Smallwood Appellants filed a third motion to intervene as defendants in the case. On June 20, 1998, after the deadline for filing a timely notice of appeal of the district court's April 3, 1998 order and April 6, 1998 judgment, the district court ruled that the Smallwood Appellants were entitled to intervene as of right in this action. As the delay in granting the motions to intervene prevented them from fully participating as parties in the district court and prevented them from being able to exercise their right to appeal, the Smallwood Appellants filed in this Court on October 2, 1998 a motion to intervene as Appellants in this case. This Court granted the motion on October 19, 1998.

B. Appeal of Summary Judgment Decision

This Court noted probable jurisdiction in *Hunt v. Cromartie* on September 29, 1998. Oral arguments were held January 20, 1999. On May 18, 1999, this Court unanimously reversed the lower court's decision and remanded for further proceedings. Justice Thomas in an opinion joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy,[6] first observed that the new District 12 was notably different than the original:

> By any measure, blacks no longer constitute a majority of District 12: blacks now account for approximately 47% of the district's total population, 43% of its voting age population, and 46% of registered voters. . . . The new District 12 splits 6 counties as opposed to 10. . . . With these changes, the district retains only 41.6% of its previous area. . . and the distance between its farthest points has been reduced to approximately 95 miles. . . .

Hunt v. Cromartie, 526 U.S. 541, 544 (1999) (citations omitted).

This Court also noted that, in evaluating a jurisdiction's motivation in creating a particular redistricting plan, a district court must engage in an inherently complex and "'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Id.* at 546 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)). This Court determined that the district court failed to conduct such an inquiry and improperly held that there were no

[6]Justice Stevens filed an opinion concurring in the judgment, in which Justices Souter, Ginsberg, and Breyer joined.

material facts in dispute. Rather, the Court observed that "[t]he legislature's motivation is itself a factual question" that was clearly in dispute. *Hunt v. Cromartie*, 526 U.S. at 549. This Court pointed to evidence that the legislature created the district "with the intent to make District 12 a strong Democratic district," *id.*, including the testimony of two legislators, who testified that the district lines are best explained by partisanship.

In addition, this Court found the testimony of an expert political scientist, Dr. David Peterson, probative. Dr. Peterson examined racial demographics, party registration and election results from the precincts within the district and those surrounding it. He found a strong correlation between the racial composition of the precincts and party preference, such that in precincts with a high African-American percentage, the voters tend to vote for Democrats at a high rate and in precincts with a low African-American percentage, the voters tend to favor Democrats at a significantly lower rate. Based upon Peterson's testimony, this Court reasoned that "the data tended to support both a political and racial hypothesis," *id.* at 550, and supported "an inference that the General Assembly did no more than create a district of strong partisan Democrats." *Id.*

This Court also found that Appellees offered only a limited analysis of a few selected precincts and this was insufficient to support a conclusion that the plan was an unconstitutional racial gerrymander. Thus, while in a few instances, the State had excluded precincts with lower proportions of African-American voters but equal or higher proportions of registered Democratic voters as the precincts included within District 12, *id.* at 548, there was an adequate basis to support the entry of summary judgment for the plaintiffs. On the other hand, the State's expert, Dr. Peterson,

was more thorough, analyzing *all* of the precincts bordering the interior and exterior of the district and examining actual voting results, not just registration data. *Id.* at 550.

In light of this evidence, this Court held that Appellees were not entitled to summary judgment. Citing prior precedents, this Court stated that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be African-American Democrats and even if the State were *conscious* of that fact." *Id.*, at 542 (emphasis in the original) (citing *Bush v. Vera*, 517 U.S. 952, 968 (1996); *Shaw v. Hunt*, 517 U.S. at 905; *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Shaw v. Reno*, 509 U.S. 630, 646), and that, based on the record before it, the motivation behind the creation of the district was in dispute and "it was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgement stage." *Hunt v. Cromartie*, at 552. Therefore, this Court reversed the lower court's judgment and remanded.

C. The District Court Trial on Remand

From November 29, 1999 to December 1, 1999, the district court held a trial during which it heard evidence regarding the rationale for the configuration of the 1997 Remedial Plan. State legislators testified at trial that in 1997, the General Assembly had two primary redistricting goals. The first was to remedy the constitutional defect found by this Court in the 1992 Plan: the predominance of racial considerations underlying the shape and location of District 12. NC. J.S. App.

at 82a - 83a, 138.[7] The second, but equally important, goal was to preserve the even partisan balance (six Republican and six Democratic members) in North Carolina's then-existing congressional delegation.

The General Assembly accomplished its first goal of enacting a plan free of constitutional defects by utilizing a variety of different redistricting techniques, including: 1) avoiding division of precincts and counties whenever possible; 2) avoiding use of narrow corridors to connect concentrations of minority voters; 3) striving for geographical compactness without use of artificial devices such as double cross-overs or point contiguity; 4) pursuing functional compactness by grouping together citizens with similar interests and needs; and 5) seeking to create districts that provide easy communication among voters and their representatives. NC. J.S. App. at 83a, 138a. Meeting the second goal of preserving the same partisan balance in the congressional delegation was essential to ensure that the General Assembly would be able to agree on a remedial plan, since the State House of Representatives was controlled by Republicans and the State Senate was controlled by Democrats. NC. J.S. App. at 83a-84a, 138a-139a.

State legislators testified, and the trial record reflects that during the 1997 redistricting process the General Assembly considered but ultimately rejected proposed plans that would have created a second majority-minority district in the area east of Charlotte toward Cumberland and Robeson Counties.

---

[7] Although District 1 in the 1992 Plan was never determined to be unconstitutional, the General Assembly elected to redraw District 1 in 1997 to ensure its compliance with the post-1990 census decisions. NC. J.S. App. at 144, 148a-149a.

Several groups and individuals, including the North Carolina Association of Black Lawyers and State Representative Mickey Michaux, objected to the 1997 Remedial Plan because, in their view, it diluted the voting strength of African-Americans in certain areas of the state and "deliberately separate[d] large politically cohesive African-American communities." *See Shaw v. Hunt*, No. 92-202-CIV-5, Memorandum in Support of Motion to Intervene (E.D.N.C. filed April 15, 1997).[8]

While the State was predominantly motivated by a desire to remedy this Court's finding of liability and to meet various political interests, the trial record indicates that the General Assembly also had before it an extensive record concerning the historical exclusion of African-American voters, continuing racial appeals in North Carolina election contests, the socio-economic disparities affecting African-American voters' opportunities to participate in the political process, the lack of success of African-American candidates, and the continuing prevalence of racially polarized voting in North Carolina. *See*

---

[8]Indeed, the majority of African-American legislators in the North Carolina House of Representatives voted against the 1997 Remedial Plan. *See* NC. J.S. App. at 140a, 152a, 153a. The plan favored by those opposed to the 1997 Remedial Plane was designed to avoid dilution; it also would have combined African-American voters in Charlotte with voters, including African-American and Native American voters, in rural areas southeast of Charlotte. The General Assembly concluded that such a district would have combined urban and rural voters with disparate and divergent economic, social and cultural interests and needs. Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-27N. Also, the General Assembly concluded that the proposed district lacked a natural means of communication and access among its residents. In addition, that district would have thwarted the goal of maintaining partisan balance in the State's congressional delegation. *Id.*

NC. J.S. App. at 34a (plaintiffs stipulated for purposes of trial that: the African-American population is politically, cohesive; the white majority votes sufficiently as a block to often enable it to defeat the minority's preferred candidate; for many decades African-Americans in North Carolina were victims of racial discrimination; and a substantial majority of the State's African-American population is still at a disadvantage in comparison to white citizens with respect to income, house, education, and health). *See also, e.g., Gingles v. Edmisten*, 590 F. Supp. 345, 359 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986); Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing Transcript, February 26, 1997 at 19-22; *id.*, Ex. 6 (Statement of Anita Hodgkiss) at 2-7; *id.*, Ex. 6, Tab 2 (Expert Report of Dr. Richard Engstrom) ("Engstrom Report"); *id.*, Ex. 6, Tab 17 (Expert Report of Dr. J. Morgan Kousser) ("Kousser Report"); *id.* at Ex. 6, Tab 17 (*Shaw v. Hunt*, Defendant-Intervenor stipulations) Nos. 1-58, 64-67).

Evidence at trial showed that the General Assembly succeeded in reaching its stated redistricting goals, particularly in creating District 12. While the 1992 Plan divided 80 precincts and 44 counties, the 1997 Plan divides only two precincts and 22 counties. District 12 in the 1997 Plan is significantly more compact geographically than it was in the 1992 Plan. The new District 12 contains parts of six counties, rather than ten, has no areas where contiguity is achieved only through "point contiguity" and does not contain any "cross-overs" or "double-cross-overs" as it did in the 1992 Plan. In the 1992 plan, District 12's boundaries divided 48 precincts, while District 12 in the 1997 Plan divides only one. NC. J.S.

App. at 84a, 139a[9]

The trial record demonstrates that the boundaries of the new District 12 were determined predominantly by partisan considerations and a desire to have an essentially urban, Democratic district in the Piedmont region. NC. J.S. App. at 84a. The configuration of District 12 reflects a strong correlation between the racial composition of the precincts and party preference of African-Americans in the district. NC. J.S. App. at 80a, 156a-157a, 170a-171a, 178a-180a. As a result, District 12's African-American total population was reduced from the original 56.63 percent in the 1992 Plan to 46.67 percent and the voting-age population was reduced from the original 53.34 percent in the 1992 plan to 43.36 percent.[10] NC. J.S. App. at 77a-79a.

D. The District Court Opinion and the Current Appeal

On March 7, 2000, over three months after the conclusion of the trial, the district court issued its decision. In an opinion strikingly similar to its prior summary judgment ruling, the Court found as a matter of fact, based upon the uncontroverted testimony of Senator Roy A. Cooper, that the House and Senate General Assembly committees formed to

---

[9]*See also Hunt v. Cromartie at* 544 ("By any measure, blacks no longer constitute a majority of District 12: blacks now account for approximately 47% of the district's total population, 43% of its voting age population, and 46% of registered voters. . . . The new District 12 splits 6 counties as opposed to 10. . . . With these changes, the district retains only 41.6% of its previous area. . . and the distance between its farthest points has been reduced to approximately 95 miles. . . .") (citations omitted).

[10]The trial record also shows that District 12 residents share a distinct community of interest. *See, e.g.*, NC. J.S. App. at 84a.

address the defects found by this Court "aimed to identify a plan which would cure the constitutional defects and receive the support of a majority of the members of the General Assembly." NC. J.S. App. at 11a. The court also accepted the uncontroverted affidavit testimony of Senator Cooper and Gary O. Bartlett, Executive Secretary-Director, State Board of Elections, that "[i]n forming a workable plan, the committees were guided by two avowed goals: (1) curing the constitutional defects of the 1992 Plan by assuring that race was not the predominant factor in the new plan, and (2) drawing the plan to maintain the existing partisan balance in the State's congressional delegation." *Id.* The court below also found that the 1997 Remedial Plan met the goal of maintaining the existing partisan balances by "avoid[ing] placing two incumbents in the same district" and "preserv[ing] the partisan core of the existing districts to the extent consistent with the goal of curing the defects in the old plan." *Id.* The court cited no evidence that directly contradicted the testimony introduced by the State to the effect that the legislature sought, in creating the 1997 Remedial Plan, to cure the constitutional defects found by this Court by ensuring that race did not predominate in its creation while minimizing partisan and political disruption.

Nevertheless, the court below found that race was the predominant factor in the creation of the 1997 Remedial Plan based largely upon its own assessment of (a) District 12's racial demographics and shape, (b) the racial characteristics of a limited number of precincts that were or were not included in the district, and (c) mathematical measures of District 12's relative compactness. *Id.* at 11a-17a. While the court asserted that "[a] comparison of the 1992 District 12 and the present District is of limited value here," *id.* at 24a, it concluded that

District 12 in the 1997 Remedial Plan is as "unusually shaped" as District 12 in the 1992 Plan. *Id.* Focusing almost exclusively on demographic data and the district's configuration, the court found "as a matter of fact that the General Assembly, in redistricting, used criteria with respect to the Twelfth District that are facially race driven." *Id.* at 28a. Finally, despite extensive conflicting factual evidence, the court below concluded that "[t]he legislature eschewed traditional districting criteria such as contiguity, geographical integrity, community of interest, and compactness in redrawing the District as part of the 1997 Plan." *Id.* at 29a.

The court found that no evidence of a compelling justification for the creation of District 12 was presented and determined that "even if such an interest did exist, the 12th District is not narrowly tailored and therefore cannot survive the prescribed 'strict scrutiny'." *Id.* The lower court, thus, never proceeded to assess whether District 12 was narrowly tailored to satisfy an identified compelling justification.[11] Instead, the court proceeded to conclude that "District 12 is an impermissible and unconstitutional racial gerrymander in

---

[11]Therefore, the court never considered or discussed whether the creation of District 12 could be justified by a compelling interest in remedying the current effects of North Carolina's long history of political exclusion and in avoiding dilution of minority voting strength. The court ignored evidence presented by the State that its "primary goals [of remedying the constitutional defects found in the 1992 Plan and preserving partisan balances in the congressional delegation] were accomplished while still providing minority voters a fair opportunity to elect representatives of their choice in at least two districts (Districts 1 and 12)," Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-27N, and that "District 12 in the State's plan also provides the candidate of choice of African-American citizens a fair opportunity to win election." *Id.*

violation of the Equal Protection Clause" and ordered the State to "redistrict the 1997 Plan in such a way that it *avoids the deprivation of the voters' equal protection rights not to be classified on the basis of race*," leaving the State "free to use *other, proper* factors in redistricting the 1997 Plan." NC. J.S. App. at 29a (emphasis added). While ruling that race was also the predominant factor in the creation of District 1, the court held that the district was narrowly tailored to meet North Carolina's compelling state interest of complying with Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. NC. J.S. App. at 35a

Judge Thornburg joined the majority insofar as it held that District 1 is constitutional; however, he dissented from the majority opinion that District 12 is an unconstitutional racial gerrymander. Judge Thornburg acknowledged the difficult challenges that confronted the North Carolina General Assembly during the 1997 redistricting process. During this process, according to Judge Thornburg, the State faced a myriad of "conflicting agendas and influences," including incumbency considerations and partisan political concerns. NC. J.S. App. at 38a. Judge Thornburg concluded that the majority was incorrect to conclude that from this "cauldron" race emerges as the predominant motivating factor leading to the creation of District 12. *Id.* He suggested that it would be impossible for the State to "navigate these treacherous waters without being aware of the issue of race," since "race loomed as *the* reason why the General Assembly had to redraw districts in the first place." NC. J.S. App. at 38a-39a (emphasis in the original). However, he concluded that it was improper for the majority to determine that race "impermissibly predominated, in a process where consciousness of race is not prohibited." *Id.* at

39a (footnote and citations omitted). In so concluding, the majority failed to hold the plaintiffs to their burden of proof and properly credit the testimony of the two state legislators who drove the 1997 redistricting process. *Id.*

REASONS FOR NOTING PROBABLE JURISDICTION

In striking down North Carolina's Twelfth Congressional District, the district court misapplied this Court's precedents and imposed its own subjective redistricting preferences as the measure of the district's constitutionality. The lower court erred by conflating any consciousness or awareness of race with the application of strict scrutiny and a finding that District 12 is a racial gerrymander. In addition, the court erred by failing to examine whether any compelling justification could exist for the creation of the challenged district. Finally, the district court exceeded its authority in ordering that the state develop a remedy after the election process had begun and only a year before a new plan would have to be developed following the release of the 2000 census data.

The district court's decision, if upheld, would render meaningless this Court's holding in *Shaw* and its progeny that strict scrutiny would apply only if it is found that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Bush*, 517 U.S. at 952 (*quoting Miller*, 515 U.S. at 913). The district court's reasoning would apply strict scrutiny to all districts drawn for political purposes even if race was only found to be one of several factors in the redistricting process.

I. The Court Erred by Effectively Holding that Race-consciousness Triggers "Strict Scrutiny."

As noted *supra* in the Statement of the Case, the court below failed to assess most of the evidence presented by the Defendants and Defendant-Intervenors at trial. Instead, the court recited statistics concerning the racial composition and political party registration of voters in a small number of precincts placed inside or outside of District 12. Without even addressing the other factors that state legislators took into account in the redistricting process, the court concluded from its limited factual recitation not only that the 1997 Remedial Plan was race-conscious, but also that it must be struck down as motivated *predominantly* by racial considerations. Indeed, the district court ordered that, in designing its remedy, the State should limit the factors it could use in its redistricting to factors other than race, characterizing only those non-racial factors as proper. NC. J.S. App. at 29a.

In the circumstances of this case, this ruling amounted to a holding, contrary to this Court's repeated admonitions, that race-conscious districting is inherently unconstitutional. Because such a rule would eviscerate the protections against minority vote dilution provided by Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and is flatly inconsistent with this Court's *Shaw* decisions, the judgment below must be reversed.

As this Court has held, Appellees' evidentiary burden in this case is to show that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," *Bush*, 517 U.S. at 952 (*quoting Miller*, 515 U.S. at 913), and "that other, legitimate districting principles were 'subordinated' to race."

Bush, 517 U.S. at 958. *See generally id.* at 259-68. It is insufficient for a court to find, as here, that a redistricting process was conducted with some "consciousness of race." *See Bush*, 517 U.S. at 1051. As Justice O'Connor has observed:

> States may intentionally create majority-minority districts and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected, *and* that neglect is predominantly due to the misuse of race, does strict scrutiny apply.

Bush, 517 U.S. at 993. (O'Connor, J., concurring) (emphasis in original); *see also United States v. Hays*, 515 U.S. 737, 745 (1995) ("We recognized in *Shaw*. . .that the 'legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination'") (citation omitted) (emphasis in original).

In *Shaw v. Reno*, 509 U.S. at 653, this Court held that it would be the extraordinary case in which strict scrutiny would apply. Indeed, in *Shaw*, *Miller*, and *Bush*, the district courts applied strict scrutiny only after they determined that race played a *predominant* role in the design of the districts at issue. *Miller*, 515 U.S. at 928 (O'Connor, J., concurring); *Shaw v. Hunt*, 517 U.S. at 903; *Bush*, 517 U.S. at 952. And those determinations were not based upon mere "race consciousness." For example, in *Shaw v. Hunt*, this Court found sufficient "direct evidence" that the State's "overriding purpose" was to "create two congressional districts with effective black voting *majorities*" and that other considerations "came into play only after the race-based decision had been made." *Shaw v. Hunt*,

517 U.S. at 906 (original emphasis omitted and emphasis added). In *Miller*, the State conceded that the district at issue was the "product of a desire by the General Assembly to *create a majority black district*," *Miller*, 515 U.S. at 918 (emphasis added), and that the creation of the district "violate[d] all reasonable standards of compactness and contiguity." *Id.* at 919. The court below made no such findings and the record below demonstrated that race did not predominate in the creation of the district.

This Court has repeatedly recognized the reality of race-consciousness during the redistricting process and reserved strict scrutiny only to those circumstances where race predominated. *See, e.g., Bush*, 517 U.S. at 958 ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Nor does it apply to all cases of intentional creation of majority-minority districts") (citations omitted); *Lawyer v. Department of Justice*, 521 U.S. 567 (1997) (upholding the constitutionality of a Florida state legislative districting plan that was drawn with conscious consideration of race to settle litigation challenging prior plan, creating majority-minority district that afforded minority voters opportunity to elect candidates of choice that was somewhat irregularly shaped and that split county and city boundaries); *Abrams v. Johnson*, 521 U.S. 74 (1997) (approving congressional districting plan for Georgia having majority-African-American district); *King v. State Board of Elections*, 522 U.S. 1087 (1998) (*per curiam*) (summarily affirming district court ruling upholding the constitutionality of Illinois' Fourth Congressional District). This principle has been consistently applied by various district and appellate courts that have considered constitutional challenges brought under the

Shaw regime. *See, e.g., Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Theriot v. Parish of Jefferson*, 185 F.3d 477 (5th Cir. 1999); *Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff'd*, 515 U.S. 1170 (1995),[12]

This Court's most recent ruling in *Hunt v. Cromartie* itself is most instructive. In ruling that the lower court was in error to hold District 12 unconstitutional without a trial, this Court concluded that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. at 542 (emphasis in the original) (citing *Bush*, 517 U.S. at 968; *Shaw v. Hunt*, 517 U.S. at 905; *Miller*, 515 U.S. at 916; *Shaw v. Reno*, 509 U.S. at 646). This Court determined that

> Evidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference.

[12]A further understanding of the *DeWitt* decision can be gained by reviewing the decision of the California Supreme Court that created the redistricting plans challenged in *DeWitt*. *See Wilson v. Eu*, 823 P.2d 545, 563-64, 582, 583-84, 594, 1 Cal. 4th 707, 746, 775, 776, 790, 4 Cal. Rptr. 2d 379, 397-8, 416, 417-8, 428 (1992) (describing the various special efforts taken to create districts that would comply with the Voting Rights Act).

Hunt v. Cromartie at 526 U.S. at 542. In view of *Cromartie*, it is clearly evident that if a jurisdiction draws district lines to fulfill partisan political objectives, the fact that a large number of residents of the district are also members of a racial minority group does not, in and of itself, convert the district to a "racial gerrymander."

Thus, even if the Twelfth Congressional District created by the 1997 Remedial Plan had been a majority-minority district that would not, standing alone, compel a finding of unconstitutionality. The fact that the State included strong Democratic performing precincts in District 12, that a number of these precincts were majority African-American, and that those leading the redistricting process were aware of that fact, does not constitute a violation of the Constitution. To hold otherwise would invalidate this Court's holding in *Cromartie* that permits a state to meet its partisan political goals even if it is aware of the race of the voters used in the process. It would automatically render any plan drawn with even the mere awareness of race unconstitutional. As the prior iteration of the case before the Court, *Cromartie* provides the template for analyzing the claims presented in this case. The lower court failed to cite to or discuss this Court's analysis *Cromartie* and in so doing failed to acknowledge this important precedent.

Equally significant, the court below failed to give any consideration – much less appropriate weight – to the political realities confronted by the General Assembly during the redistricting process. Although the General Assembly's primary goals in enacting the 1997 Remedial Plan were to correct the prior constitutional violation found by this Court in *Shaw v. Hunt* and to preserve the congressional delegation's partisan balance, the State could not achieve these goals in a political

vacuum. As the testimony showed, among other political considerations, legislators were concerned that the plan developed be racially fair. NC. J.S. App. at 121a, 130a, 147a-148a, 151a. This was not only important given the history of political exclusion and discrimination that was in the record before the General Assembly members, but was also necessary to achieve the political goals of securing enough support for the 1997 Remedial Plan from African-American political and legislative leaders in the General Assembly. *See* NC. J.S. App. at 151a, 147a. Such considerations do not relegate a redistricting plan to strict scrutiny. *See Lawyer*, 521 U.S. at 581 (upholding the constitutionality of a majority-minority district that district court found "'offers . . . any candidate, without regard to race, the opportunity' to seek and be elected to office") (quoting and citing *Scott v. United States*, 920 F. Supp. 1248, 1256 (M.D. Fla. 1996)); *DeWitt*, 856 F. Supp. at 1413-14 (finding that the California redistricting plan, containing intentionally created majority-minority districts, was not an unconstitutional racial gerrymander because the plan "evidences a judicious and proper balancing of the many factors appropriate to redistricting, one of which was the consideration of the application of the Voting Rights Act's objective of assuring that minority voters are not denied the chance to effectively influence the political process").

II. The District Court Erred by Failing to Determine Whether the State had a Compelling Justification for Creating a Narrowly Tailored District 12

Even if the district court was correct to find that race was the predominant factor in the drawing of District 12, the court erred by failing to consider whether it was narrowly tailored to achieve an identified compelling governmental

interest.

As discussed, *supra*, the district court concluded that, in drafting the 1997 Remedial Plan, the State disregarded traditional redistricting criteria and found that race was the predominant factor in the creation of District 12. But, the court never engaged in the necessary strict scrutiny analysis, assessing whether District 12 was narrowly tailored to satisfy an identified compelling justification. Rather, the court found that no evidence of a compelling justification for the creation of District 12 was presented[13] and determined that "even if such an interest did exist, the 12th District is not narrowly tailored and therefore cannot survive the prescribed 'strict scrutiny.'" NC. J.S. App. at 29a. The lower court, thus, never conducted the required analysis to determine whether District 12 was narrowly tailored to satisfy a specified compelling justification.

Even where a court finds that race predominated in the redistricting process, its inquiry does not end. This Court's *Shaw* jurisprudence requires a court to assess whether there was a compelling justification for a plan drawn with race as a predominant factor, and whether the plan was narrowly tailored to serve that justification. *See, e.g., Shaw v. Hunt*, 517 U.S. at 914 (assuming without argument that "§ 2 could be a compelling interest"); *Miller*, 515 U.S. at 915 (race-consciousness in drawing district lines would not alone render a districting plan presumptively unconstitutional). The lower court erred by discontinuing its inquiry once it concluded that race predominated in the creation of District 12.

---

[13]This finding is clearly erroneous in light of the parties' stipulation referred to *infra*.

If the district court had engaged in the correct analysis, it would have had to conclude that the 1997 Remedial Plan is justified. The trial record indicates that, in creating the plan, the legislature was aware of North Carolina's long history of official discrimination against African-Americans and their exclusion from the political process due to state and private action. In addition, plaintiffs stipulated to this history and its lingering effects. *See* NC. J.S. App. at 34a. Moreover, there was evidence that the State sought to "provid[e] minority voters a fair opportunity to elect representatives of their choice in at least two districts (Districts 1 and 12)," NC. J.S. App. at 64a, and that District 12 does afford African-American voters a fair chance to elect their candidate of choice. *See* NC. J.S. App. at 66a. The district court erred in not engaging in the rigorous strict scrutiny inquiry required by this Court.

III. The District Court Erred in Ordering Redistricting on the Eve of the Post-2000 Census Redistricting Cycle

The district court's decision came on the eve of the 2000 redistricting and just days before absentee balloting for the 2000 congressional primary election was to begin. However, the delay of this case began months earlier, when, despite the urgency of the State's election schedule, the district court failed to issue its discovery schedule until August 23, 1999, three months after this Court's decision. Although the district court was aware that the State's election process had begun, it nevertheless delayed over three months after an expedited trial to issue its opinion. In the time that the trial court took to issue its opinion, the State's election process was fully engaged.

Any remedy in this case that requires redistricting threatens to disrupt the on-going election process, perhaps

requiring a new primary and a delay in the general election. Appellees have indicated clearly that they will seek just such a remedy. *See, e.g.*, Appellees' Motion to Expedite Schedule for Appeal. The injury from disrupting election processes is significant and has been well documented by this Court and the federal trial courts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964).[14] Moreover, minority voters are particularly injured by this disruption. *See* Smallwood Appellants' Application to Stay Decision of the United States District Court for the Eastern District of North Carolina Pending Appeal at 2-6. The harms

---

[14]These principles have guided federal trial courts in both reapportionment and vote dilution cases. *See, e.g., Diaz v. Silver*, 932 F. Supp. 462, 466 (E.D.N.Y. 1996) (preliminary injunction denied to avoid harming public interest where elections scheduled in a few months, even though court found likelihood of success on *Shaw* claim and irreparable injury to plaintiffs); *Cardona v. Oakland Unified School District*, 785 F. Supp. 837, 843 (N.D. Cal. 1992) (court refused to enjoin election where primary "election machinery is already in gear," including the passage of deadline for candidates to establish residency and start of candidate nominating period); *Republican Party of Virginia v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991) (injunction denied in case with "uncertain cause of action with only possible irreparable harm" and where time for election was close and there was danger of low voter turnout if election postponed); *Cosner v. Dalton*, 522 F. Supp. 350 (E.D. Va. 1981) (three-judge court) (use of malapportioned plan not enjoined where elections were two months away); *Shapiro v. Maryland*, 336 F. Supp. 1205 (D. Md. 1972) (court refused to enjoin election where candidate filing deadline was imminent and granting relief would disrupt election process and prejudice citizens, candidates and state officials); *Sincock v. Roman*, 233 F. Supp. 615 (D. Del. 1964) (three-judge court) (*per curiam*) (enjoining election would result in disruption in ongoing election process which would cause confusion and possible disenfranchisement of voters); *Meeks v. Anderson*, 229 F. Supp. 271, 274 (D. Kan. 1964) (three-judge court) (court held malapportioned districts unconstitutional but concluded that the "ends of justice" would "best be served" by permitting elections to proceed).

that could result from such disruption prompted the three-judge district court in the earlier litigation in *Shaw v. Hunt* litigation to deny injunctive relief to plaintiffs in 1996, where only a few months remained before the general election. *See also Reynolds*, quoted *supra*, 377 U.S. at 585 ("[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid"). *See also Watkins v. Mabus*, 502 U.S. 954 (1991); *Republican Party of Shelby County v. Dixon*, 429 U.S. 934 (1976); *Ely v. Klahr*, 403 U.S. 108 (1971). Thus, even if the court below was correct in holding that District 12 is unconstitutional, it nevertheless erred by requiring immediate relief, when such relief would disrupt an election process that was so far advanced.

Moreover, in less than one year, the Census Bureau will release the 2000 Census data and the State will begin the redistricting process anew, a process that inevitably will result in at least some Congressional districts being redrawn. To require the State to engage in the disruptive process now only to repeat it in less than a year would be unduly burdensome and duplicative. *Cf. Maxwell v. Foster*, No. 98-1378, (W.D. La. Nov. 24, 1999), attached to the Smallwood Appellants' Application to Stay Decision of the United States District Court for the Eastern District of North Carolina Pending Appeal as Appendix E.

As the next redistricting cycle is imminent, allowing the state to proceed with elections under the 1997 Remedial Plan would not permanently prevent plaintiffs from acquiring the

remedy they seek: a new redistricting plan. If during or after the 2000 redistricting cycle, plaintiffs are not satisfied with the new plan, they may participate in the process of creating a more palatable plan or challenge the constitutionality of the plan subsequently. The reasoning of the court in *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 502 (7th Cir. 1991) is directly on point:

> The district court also concluded that, on equitable grounds, the pending 1991 redistricting (based on the 1990 census) makes entry of relief inappropriate. The district court did not err in making this finding. The legislative reapportionment is imminent, and Districts 49 and 51 may well be reshuffled. The legislature should now complete its duty, after which the plaintiffs can reassess whether racial bias still exists and seek appropriate relief.

Furthermore, this is consistent with the most recent decisions of district courts that have considered constitutional challenges to redistricting plans late in the decade. *See, e.g., Maxwell v. Foster*, No. 98-1378, slip op. at 7 and 8 (W.D. La. Nov. 24, 1999) (district court granting State of Louisiana's motion for summary judgment and finding that "rapid-fire reapportionment immediately prior to a scheduled census would constitute an undue disruption of the election process, the stability and continuity of the legislative system and would be highly prejudicial, not only to the citizens of Louisiana, but to the state itself"), attached to the Smallwood Appellants' Application to Stay Decision of the United States District Court for the Eastern District of North Carolina Pending Appeal as Appendix E. Therefore, even if this Court should hold District 12 unconstitutional, rather than requiring the State to engage in a

disruptive redistricting process that will invariably produce districts drawn according to inaccurate data, this Court should act consistent with well-established precedent to permit the State to proceed with the 2000 elections under the 1997 Remedial Plan.

CONCLUSION

For the foregoing reasons, this Court should summarily reverse the judgment of the district court. In the alternative, this Court should note probably jurisdiction of this appeal.

Respectfully submitted,

ELAINE R. JONES
Director-Counsel
NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, NY 10013
(212) 219-1900

ADAM STEIN
FERGUSON, STEIN, WALLAS,
ADKINS, GRESHAM &
SUMTER, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

TODD A. COX*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 Eye Street, NW
10th Floor
Washington, DC 20005
(202) 682-1300
**Counsel of Record*

Attorneys for Appellant-Intervenors

APPENDIX

APPENDIX A

UNITED STATES DISTRICT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Civil Action No. 4:96-CV-104

MARTIN CROMARTIE, *et al.*
Plaintiffs,

v.

JAMES B. HUNT, JR., *et al.*,
Defendants,

and

ALFRED SMALLWOOD, *et al.*,
Defendant-Intervenors.

FILED
MAR 13 2000
DAVID W. DANIEL, CLERK

DEFENDANT-INTERVENORS' NOTICE OF APPEAL

Notice is hereby given that Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins, Defendant-Intervenors, hereby appeal to the Supreme Court of the United States from March 8, 2000 Judgment and the March 7, 2000 order declaring North Carolina's Twelfth Congressional District unconstitutional and

enjoining the State of North Carolina from using the district in future elections.

This appeal is taken pursuant to 28 U.S.C. Sec. 1253.

This the 13th day of March, 2000

Respectfully Submitted,

/s/ Adam Stein
ELAINE R. JONES
Director-Counsel
NORMAN J. CHACHKIN
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, New York 10013
(212) 219-1900

TODD A. COX
NAACP Legal Defense and
Educational Fund, Inc.
1444 Eye Street, N.W., 10th Floor
Washington, D.C. 20005
(202) 682-1300

ADAM STEIN
Ferguson, Stein, Wallas, Adkins,
Gresham & Sumter, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

[certificate of service omitted in printing]

Supreme Court, U.S.
FILED
MAY 25 2000
CLERK

Nos. 99-1864 and 99-1865

In the

Supreme Court of the United States

JAMES B. HUNT, JR., *et al.*
Appellants,

and

Alfred Smallwood, *et al.*
Appellant-Intervenors,

v.

MARTIN CROMARTIE, *et al.*
Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM

MARTIN B. McGEE
WILLIAMS, BOGER
GRADY, DAVIS & TUTTLE
708 McLain Rd.
Kannapolis, NC 28081
(704) 932-3157

DOUGLAS E. MARKHAM
P.O. Box 130923
Houston, TX 77219-0923
(713) 655 - 8700

ROBINSON O. EVERETT*
SETH A. NEYHART
EVERETT & EVERETT
P.O. Box 586
Durham, NC 27702
(919) 682-5691

*Counsel of Record

May 25, 2000

Attorneys for Appellees

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is there evidence to support the district court's finding that race predominated in creating the Twelfth District?

2. Was the district court correct in finding that the racially gerrymandered Twelfth District did not survive strict scrutiny?

3. Did the district court properly reject Appellants' claim preclusion argument?

4. Did the district court act within its discretion when it prohibited use of the unconstitutional Twelfth District in future elections?

[This page is intentionally left blank.]

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CITED AUTHORITIES iii

MOTION TO AFFIRM 1

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 10

I. THE EVIDENCE AT TRIAL AMPLY SUPPORTED THE DISTRICT COURT'S FINDING OF A PREDOMINANT RACIAL MOTIVE 10

A. Circumstantial Evidence Clearly Establishes The Twelfth District's Race-Based Purpose ... 12

B. The Expert Testimony Supported the Finding that Race Predominated in the Formation of the Twelfth District 18

C. Direct Evidence Produced at Trial Confirms the Overwhelming Circumstantial Evidence that the Twelfth District is Racially Gerrymandered 22

II. THE TWELFTH DISTRICT FAILS THE STRICT SCRUTINY TEST 25

III. APPELLANTS' CLAIM PRECLUSION ARGUMENT LACKS MERIT 26

IV. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN PROHIBITING FURTHER USE OF THE TWELFTH DISTRICT .. 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Anderson v. City of Bessemer,
470 U.S. 564 (1985) 11

Bush v. Vera,
517 U.S. 952 (1996) 16, 21

Cromwell v. County of Sac,
94 U.S. 351 (1876) 26

Federated Dept. Stores, Inc. v. Moite,
452 U.S. 394 (1981) 26

Gomillion v. Lightfoot,
364 U.S. 339 (1960) 12

Hays v. Louisiana,
936 F.Supp. 360 (W.D.La. 1996) 28

Hunt v. Cromartie,
526 U.S. 541 (1999) 3, 4, 12, 13

Klugh v. United States,
818 F.2d 294 (4th Cir. 1987) 27

McQueeney v. Wilmington Trust Co.
779 F.2d 916 (3rd Cir. 198 5) 25

Miller v. Johnson,
515 U.S. 900 (1995) 12

Public Service Comm'n of Missouri v. Brashear Freight Lines, Inc. 306 U.S. 204 (1939) 6

Reynolds v. Sims,
377 U.S. 533, 585 (1964) 27, 28

Shaw v. Hunt,
517 U.S. 899 (1996) 1, 25, 27

Shaw v. Reno,
509 U.S. 630 (1993) 6, 12, 14

United States v. Hays,
515 U.S. 737 (1995) 26

Vera v Bush,
933 F.Supp. 1341 (S.D. Tex. 1996) 28, 29

STATUTES & RULES

42 U.S.C. §1973 4

FED. R.CIV. P. 52(a) 11

1998 N.C. Sess. Laws, ch.2, § 1.1 3

SECONDARY AUTHORITIES

Pildes & Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993) 13

MOTION

Pursuant to Rule 18.6 of the Rules of the Supreme Court of the United States, Appellees move that the Court summarily affirm the judgment sought to be reviewed, or in the alternative, dismiss the appeal on the ground that the questions it raises are so insubstantial as to require no further argument. The extensive record before the district court amply supported its findings that race predominated in drawing the Twelfth District in the 1997 Plan and that the district failed the strict scrutiny test. In light of these findings the court properly concluded that this District should not be used in Congressional primaries or elections.

COUNTERSTATEMENT OF THE CASE

After over four years of legal battle requiring two appeals to this Court, North Carolina's "bizarre" Twelfth District as drawn in the 1992 Plan was finally held unconstitutional. *See Shaw v. Hunt*, 517 U.S. 899 (1996). Three weeks later, on July 3, 1996, Martin Cromartie and two other registered voters in Tarboro filed a separate action in the Eastern District of North Carolina to have the First Congressional District also declared unconstitutional.[1] District Judge Malcolm J. Howard, to whom the case was assigned, entered a stay order and periodically extended it awaiting final resolution of the *Shaw* case.

---

[1] None of the original plaintiffs in the *Shaw* litigation had standing to challenge the First District because none of them resided there. On July 9, 1996, a second amended complaint was filed in *Shaw*, listing Cromartie and the other two Tarboro voters in the caption as plaintiffs. (*See* Appellants' J.S. App. at 283a-304a.)

On April 1, 1997, the General Assembly submitted its 1997 Redistricting Plan to the *Shaw* district court for review. On September 12, 1997, that court filed an order approving the 1997 Plan. In so doing, however, the Court emphasized the limited nature of its approval.[2]

On October 10, 1997, after termination of the *Shaw* litigation in the previous month, the *Cromartie* plaintiffs filed an "Amended Complaint and Motion for Preliminary and Permanent Injunction." This amended complaint included as plaintiffs not only the three original plaintiffs from the First District, but also other plaintiffs who were registered voters in the 1997 Plan's Twelfth District. When the State then moved to have the *Shaw* panel take jurisdiction over the *Cromartie* suit, that panel denied the motion;[3] and the State did not appeal.

On January 15, 1998, the *Cromartie* case was

---

[2] The district court stated:

> We close by noting the limited basis of the approval of the plan that we are empowered to give in the context of this litigation. It is limited by the dimensions of this civil action as that is defined by the parties and the claims properly before us. Here, that means that we only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not--cannot--run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12.

(Appellants' J.S. App. at 320a.)

[3] At the same time the State also sought to have the *Shaw* panel consider a case, *Daly v. Leake*, No. 5: 97-CV-750-BO (E.D.N.C filed July 3, 1996), pending before what became the *Cromartie* panel and which challenged not only North Carolina's 1997 congressional redistricting plan but also the State's House and Senate apportionment plans.

reassigned from Judge Howard to a three-judge district court panel consisting of Circuit Judge Sam Ervin III, and District Judges Terrence Boyle and Richard Voorhees. On January 30, 1998, the *Cromartie* plaintiffs renewed the prayer for relief contained in their amended complaint by filing a motion for preliminary injunction; and on February 5, 1998, they moved for summary judgment. On March 3, 1998, defendants responded with their cross-motion for summary judgment.

On April 3, 1998, the district court granted plaintiffs' motions for summary judgment and for preliminary and permanent injunctions. The defendants unsuccessfully requested a stay from the district court and this Court. The district court granted the legislature an opportunity to draw a new plan (the "1998 Plan") and to conduct the 1998 congressional primaries and elections under that plan. The 1998 Plan reduced the African-American population of the Twelfth District to about 35% from almost 47% in the 1997 Plan. Moreover, unlike the 1997 Plan, in which all six counties of the Twelfth District had been divided, the corresponding district in the 1998 Plan had one undivided county and split four others.[4]

The law enacting the 1998 Plan contained a proviso that this plan would be used in the 1998 and 2000 primaries and elections, unless the Court rendered a favorable decision in the appeal the State was pursuing with respect to the district court's summary judgment for plaintiffs. *See* 1998 N.C. Sess. Laws, ch. 2, §1.1. On May 17, 1999, the Court reversed the summary judgment that had been entered in the plaintiffs' favor. *See*

---

[4] Instead of splitting four major cities--Charlotte, Winston-Salem, Greensboro, and High Point--as well as Statesville, Salisbury, and Lexington, the 1998 Plan's Twelfth District split only Charlotte and Winston-Salem. Furthermore, the 1998 Plan accomplishes the same purported objectives that were put forward as rationales for the 1997 Plan.

Hunt v. Cromartie, 526 U.S. 541 (1999). The effect of this decision was to reinstate the 1997 Plan for use in primaries and elections in the year 2000.

In *Cromartie,* the Court discussed the evidence and concluded that, although a predominant racial motive of the Legislature could be inferred from the plaintiffs' evidence, the State had raised an issue of fact to be decided in a trial. In remanding for determination of the legislative motive, the Court observed that "the District Court is more familiar with the evidence than this Court, and is likewise better suited to assess the General Assembly's motivations." *Id.* at 553-54.

Preparation for trial was extensive and was conducted on an expedited schedule. After the sudden death of Judge Ervin, District Judge Lacy H. Thornburg was assigned to the panel as Circuit Judge Designate; and he presided at the trial, which lasted from November 29, 1999 until December 1, 1999. The plaintiffs called eight witnesses to testify and defendants called four. The court received voluminous documentary evidence.

On March 7, 2000, the district court delivered its opinion, finding race the predominant motive in the creation of the 1997 Plan's Twelfth and First Districts. The court also found "no evidence of a compelling state interest in utilizing race to create the new 12th District has been presented." (Appellants' J.S. App. at 29a.) On the other hand, the court found the First District survived strict scrutiny because of the State's compelling interest in avoiding possible liability under Section 2 of the Voting Rights Act. *See* 42 U.S.C. §1973.

Concurrent with filing notice of appeal on March 10, 2000, Appellants requested a stay from the district court. After denial of that request on March 13, 2000, the same day Appellant-Intervenors gave notice of appeal, the Appellants

applied to this Court for a stay; it was granted on March 16, 2000.[5] Almost immediately thereafter Appellees moved unsuccessfully to expedite the schedule for appeal. After Appellants sought a thirty-day extension to file their jurisdictional statement and Appellees filed their opposition, the Court allowed a ten-day extension until May 19, 2000.

SUMMARY OF ARGUMENT

Neither the Appellants' nor the Appellant-Intervenors' jurisdictional statement raises an issue that merits the attention of this Court. Indeed, the Questions Presented ignore the plaintiffs' extensive evidence[6] and relate only tangentially to the record of trial.[7] Moreover, Appellants disregard the

---

[5] The Court's order dated March 16, 2000, provided that "[i]f the appeals are dismissed, or the judgment affirmed, this order shall terminate automatically. In the event jurisdiction is noted or postponed, this order will remain in effect pending the sending down of the judgment of this Court." 529 U.S.__ (2000).

[6] For example, in each jurisdictional statement the first Question Presented refers to the Twelfth District as "somewhat irregular" or "slightly irregular" in shape. Such a description is at odds with any "eyeball" perception of that district as portrayed in maps thereof and with the statistics indicating that the district is one of the least compact in the nation. The Appellants' first Question Presented refers to the State's having "considered race," but the district court found that race was the predominant motive, a finding going far beyond "consideration" or "consciousness" of race.

[7] The Appellants' second Question Presented asks whether the strict scrutiny of *Shaw* is invoked simply by showing that the challenged district was intentionally created as a majority-minority district. Since the Twelfth District in the 1997 Plan was not majority-minority, this Question obviously concerns only the First District, which the court below found to be constitutional since it passed the test of strict scrutiny. As to that district,

statement made by their lead counsel at trial to the effect that the Twelfth District involves "purely a factual matter"--whether race had been the legislature's predominant motive in drawing the District. (Tr. at 31.)

At trial the plaintiffs did not rely solely on the circumstantial evidence they presented some eighteen months earlier in seeking summary judgment. Instead, as a result of extensive discovery and trial preparation, they presented additional persuasive evidence that race had been the predominant motive in creating the 1997 Plan's Twelfth District. This evidence included testimony of three prominent legislators who were serving when the 1997 Plan was enacted and were convinced that a predominant racial motive existed.[8] The plaintiffs also offered testimony of several other persons active in politics and familiar with the contours and voting patterns of the Twelfth District. Each testified from his broad

---

the Appellants' Question is misstated because the district court found that race predominated in its creation, and the evidence amply supported this finding. The First District in the 1997 Plan unnecessarily splits nine major cities and towns by race, divides half of its counties, and violates compactness and other traditional redistricting principles. Under the circumstances described by the district court, (*see* Appellants' J.S. App. at 18a, 30a), clearly *Shaw v. Reno*, 509 U.S. 630 (1993), applies and the only substantive issue concerning the First District is whether the district court ruled correctly that it satisfied the test of strict scrutiny. The matter of the First District would be a question for plaintiffs to present--if they chose to do so--rather than for the State defendants. Appellees doubt that Appellants even have standing at this point to seek from the Court an advisory opinion as to whether the evidence concerning the predominance of race in the Majority-Minority First District triggered the test of strict scrutiny. *Cf. Public Service Comm'n of Missouri v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939).

[8] Unlike the two legislators who testified for the defendants, the plaintiffs' witnesses had no reason to offer *post hoc* rationalizations as to the predominant motive of the General Assembly.

experience that race was the only explanation for the manner in which the Twelfth District had been drawn.

The plaintiffs offered in evidence portions of the 1997 Plan's legislative history which made clear the predominance of race. In addition, plaintiffs presented a "smoking gun" e-mail authored by Gerry Cohen, who operated the General Assembly's computer to create the 1997 Plan.[9] Cohen sent the e-mail to Senators Roy Cooper and Leslie Winner, who both were very involved in preparing the 1997 Plan.[10] This e-mail revealed clearly that race predominated in shaping the First and Twelfth Districts.[11]

---

[9] Cohen played a similar role in drawing the 1992 Redistricting Plan.

[10] As a retained counsel for the General Assembly, Senator Leslie Winner had played a major role in creating the unconstitutional 1992 Plan.

[11] The e-mail, Ex. 58, was sent on February 10, 1997, and reflected, *inter alia*, the change which gave the 1997 Plan Twelfth District its ultimate form.

> By shifting areas in Beaufort, Pitt, Craven, and Jones Counties, I was able to boost the minority percentage in the first district from 48.1% to 49.25%. The district was only plurality white, as the white percentage was 49.67%.
>
> This was all the district could be improved by switching between the 1st and 3rd unless I went to Pasquotank, Perquimans, or Camden. I was able to make the district plurality black by switching precincts between the 1st and 4th in Person/Franklin Counties (Franklin was all in the 1st under Cooper 3.0, but had been in the 4th District in the 80's under Price. By moving four precinct [sic] each way, I was able to boost the District to 49.28% white, 49.62% Black. About 0.6% is native American (Haliwa). I could probably improve thins [sic] a bit more by switching precincts in Granville and Franklin between the 1st and 4th.
>
> I have moved Greensboro Black Community into the 12th, and now need to take bout [sic] 60,000 out of the 12th. I await your direction on this. I am available Tuesday.

At trial, plaintiffs offered as an expert Dr. Ron Weber, a political scientist with extensive experience in redistricting litigation.[12] His detailed expert testimony, (Tr. at 143-321), and related reports established that race clearly predominated as the motive for drawing the Twelfth District. Appellants, on the other hand, offered as an expert Dr. David Peterson, a statistician who lacked prior contact with redistricting. He used an untested methodology which had never received any peer review and was shown to be defective and unreliable.

At the outset of the trial, counsel for Appellants conceded that no "compelling state interest" existed to justify the Twelfth District if the court found race had been the predominant motive in creating that district. (*See* Tr. at 32.) Counsel for Appellant-Intervenors took the same position.[13] (*See* Tr. at 596.) In any event, the district court properly found no evidence had been offered to show any compelling state interest or that the Twelfth District had been narrowly tailored.

Appellants seek to raise an issue of claim preclusion. (*See* Appellants' J.S., Question 3.) The district court properly rejected this defense because the *Shaw* panel made clear in its Memorandum Opinion of September 12, 1997, that claim

---

[12] As the Court may be aware, Dr. Weber has been involved extensively as an expert in redistricting litigation in North Carolina, Georgia, Louisiana, Virginia, and Texas.

[13] Appellant-Intervenors did not raise this issue in the pretrial order or during the trial, or offer any evidence in this regard. Under these circumstances, Appellees are surprised that Appellant-Intervenors now contend that the"District Court Erred by Failing to Determine Whether the State had a Compelling Justification for Creating a Narrowly Tailored District 12." (Appellant-Intervenors' J.S. at 22.) It would seem that Appellant-Intervenors would be precluded from raising this issue on appeal because they did not preserve it at trial.

preclusion would not apply.[14] (*See* Appellants' J.S. at 2a-3a & n.1.) Furthermore, even if the *Shaw* panel had intended to bind non-parties, its order would not have this effect under familiar principles of res judicata.

The final Question Presented by each jurisdictional statement concerns the district court's discretion to enjoin the State from using the unconstitutional Twelfth District to conduct primaries and elections this year. However, the court below had ample precedent for enjoining use of an unconstitutional district at this stage in the electoral process.[15] Appellants and Appellant-Intervenors have no basis in the precedents they cite for overturning the district court's decision to prevent use of an unconstitutional congressional district.[16]

Indeed, to allow congressional elections to take place in North Carolina under the unconstitutional 1997 Plan would be an abuse of discretion. The Court would be rewarding the Legislature for its refusal to accept the instruction provided by this Court in the *Shaw* litigation.[17] If the General Assembly had

---

[14] Two years earlier the district court took the same view in rejecting this claim preclusion defense. (*See* Appellants' J.S. at 245a-46a.) Apparently neither Judge Ervin nor Judge Thornburg disagreed with the majority on this issue.

[15] For example, in the summer of 1998 the North Carolina Legislature enacted a new redistricting plan, and congressional primaries took place that Fall without incident. In Texas, in 1996, thirteen congressional districts were redrawn and congressional primaries took place uneventfully at the time of the general election.

[16] The 1997 Plan had not been used previously; and so the issue was not whether to allow continued use of a plan, but instead whether to permit the initial use of an unconstitutional district for an election.

[17] Instead of applying traditional race-neutral redistricting principles, the State seeks to retain as much as possible of the unconstitutional 1992 Plan. The legislative history states an intent to retain in the 1997 Plan the "cores" of the districts in the earlier 1992 Plan. In the words of Senator Cooper, the

proceeded promptly to enact a constitutional redistricting plan after the district court's decision early in March 2000, confusion and cost could have been avoided in various ways. Appellants now seek to invoke the problems created by their own obstinance as the reason for compelling the district court to allow use of the unconstitutional 1997 Plan in current elections. The Court should not reward such tactics and deprive the district court of the opportunity to consider the many feasible alternatives to using the unconstitutional Twelfth District.

ARGUMENT

I. THE EVIDENCE AT TRIAL AMPLY SUPPORTED THE DISTRICT COURT'S FINDING OF A PREDOMINANT RACIAL MOTIVE.

Carefully adhering to the instructions of this Court on remand, the district court conducted a three-day trial from November 29, 1999 to December 1, 1999. It heard evidence from twelve witnesses, received over 1100 pages of deposition designations from seventeen depositions, and had before it over 350 trial exhibits--including 225 maps bound in seven three-ring binders of four-inch thickness.

Sustaining the findings of fact based on this vast array of evidence requires only that the findings not be "clearly erroneous." This standard of review recognizes that the trial

---

Twelfth District "uses as a foundation the basic core of the existing Congressional districts. No district is dramatically changed." Feb. 20, 1997 meeting of the Senate Committee on Congressional Redistricting, 97C-28F-4D(2) at 3, (Ex. 100). The Twelfth District "core" obviously was viewed in racial terms. 90.2% of the African-Americans in the 1997 Plan's Twelfth District had been in that district in the 1992 Plan, but only 48.8% of the whites had been in the 1992 Plan's Twelfth District. (*See* Tr. at 123.)

court is better positioned to determine the facts than is an appellate court. *Cf.* FED. R. CIV. P. 52(a). Appellants have previously asserted that "[t]he application of the principles laid out by this Court in *Shaw* and its progeny is not a simple exercise and requires an exacting and fact-intensive inquiry," (Appellants' Application for Extension of Time to File Jurisdictional Statement at 3), and they apparently contend that it has become "necessary for this Court to undertake the [factfinding] task itself" to determine whether race did in fact predominate in the drawing of the Twelfth District. (*Id.*, at 3-4.) Similarly, the Appellant-Intervenors asserted that "on appeal, this Court will have to determine what role, if any, that race played in the redistricting process." (Appellant-Intervenors' Application for Extension of Time to File Jurisdictional Statement at 2.)

Both Appellants and Appellant-Intervenors apparently have forgotten that "[t]he reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 574. Moreover, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* (citations omitted). "This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.*

The plaintiffs' burden was "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision

to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The district court properly found that Appellees have met their burden. Appellants now go so far as to maintain that the plaintiffs' evidence offered at trial was insufficient. This contention seems somewhat at odds with the Court's statement in remanding the case for trial that "reasonable inferences from the undisputed facts can be drawn in favor of a racial motivation finding or in favor of a political motivation finding." *Cromartie*, 526 U.S. at 552.

Appellees construe this observation to mean that the evidence they offered in 1998 was legally sufficient. However, this becomes academic, because when the case was tried in November 1999, Appellees presented not only all the evidence previously before the district court in 1998, but also extensive additional direct and circumstantial evidence that race predominated as the motive for the Twelfth District. Not only was the evidence legally sufficient to establish this, but it overwhelmingly supported this contention. Obviously, the district court was not "clearly erroneous" in making its findings in accord with this evidence.

A. Circumstantial Evidence Clearly Establishes The Twelfth District's Race-Based Purpose.

This Court has recognized that some districts are "so highly irregular that [they] rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." *Shaw v. Reno*, 509 U.S. at 646-47 (quoting Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960)). The Twelfth is such a district.

The undisputed facts show it to be one of the least compact congressional districts in the Nation, ranking either 432 or 433 out of 435 districts in "perimeter compactness" and

430 or 431 in "dispersion compactness." (Tr. at 206.) The district court found the Twelfth District's dispersion score of 0.109 and its perimeter score of 0.041 were both below the suggested "low" compactness measures articulated in Pildes & Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483, 571-73, tbl.6 (1993). (*See* Appellants' J.S. App. at 16a.) The Twelfth District is the only district in the 1997 Plan with such minimal compactness and which splits every county. The district court also found the Twelfth District was less compact than districts elsewhere that had previously been held unconstitutional. (*See id.* at 26a.)

Although the Twelfth District is somewhat wider and shorter than its unconstitutional predecessor, it generally follows the path of the 1992 Plan's Twelfth District and retains its basic "snakelike shape." *Cromartie*, 526 U.S. at 544. In fact, one legislator, in comparing the 1997 version of the Twelfth District with its 1992 predecessor, complained that "all you have done with the 12th District in this bill is knock sixty miles off of it." Mar. 26, 1997 Floor Debate of HB 586 on House Floor 97C-28F-4F(1) at 12, (Ex. 100).

When the District's bizarre shape is combined with its demographics, the single unifying factor explaining its geographical anomalies is race. As the district court found, "[t]he only clear thread woven throughout the districting process is that the border of the Twelfth District meanders to include nearly all of the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro, inclusive." (Appellants' J.S. App. at 25a.) The circumstantial evidence presented to the district court exhaustively demonstrates this fact.

The Twelfth District's total African-American population is 46.67%, a percentage the district court doubted was "sheer happenstance." (*Id.* at 28a n.8.) The percentage of

African-Americans in the six counties split by the Twelfth District is 23.6%, half of 46.67%. Guilford County has the highest percentage of African-Americans in the six split counties at 26.4%. The district court further found that almost 75% of the total population in the Twelfth District came from mostly African-American portions of the three urban counties at the ends of the district, along with parts of the three rural counties that have "narrow corridors which pick up as many African-Americans as needed for the district to reach its ideal size." (*Id.* at 12a.) As the district court also noted, in further disregard of political subdivisions the Twelfth District split its four cities and many towns along racial lines.

The district's distorted shape, therefore, results from its twisting through the Piedmont area of North Carolina to include within its boundaries as many African-Americans as possible without exceeding 50% of the total population.[18] This is depicted clearly in a map offered in evidence by Appellees.[19] (*See* Ex. 106.) As shown there, the Twelfth District starts in Mecklenburg County near the South Carolina border and moves north to include all 26 majority African-American precincts in that County, as well as all precincts with an African-American population exceeding 40%.[20]

---

[18] The General Assembly mistakenly believed that so long as the African-American population was not a majority, *Shaw v. Reno* would not apply and it would be free to draw the Twelfth District in any manner it chose in disregard of traditional race-neutral redistricting principles. *See infra* note 33.

[19] This map is lodged with the Court, as are two other maps. Exhibit 253 shows the partisan voting performance in the 1988 Court of Appeals race in the area of the Twelfth District. Exhibit 305 shows the evolution of the Twelfth District from the 1992 to the 1997 and 1998 versions.

[20] Mecklenburg County's Precinct 77 bordering South Carolina is divided between the Twelfth and the Ninth Districts to provide a narrow "land bridge" between the eastern and western portions of the Ninth District. This

As the Twelfth District continues its journey north out of Mecklenburg into Iredell County, it narrows to a mere precinct --as it does frequently in other areas of the district in order to prevent including concentrations of white voters. Upon reaching Statesville, it juts west to include two precincts with high African-American concentrations. Then its path meanders east into Rowan County, where it snakes to the south to pick up concentrations of African-Americans in Salisbury.[21] Next, the Twelfth District moves north into Davidson County, where it also includes all precincts exceeding 40% in African-American population.

The district then branches into two directions--into Forsyth County and into Guilford County. The boundaries of the Twelfth District in Forsyth County are almost perfectly tailored to maximize its minority population. (*See* Ex. 106.) The district court observed that "[w]here Forsyth County was split, 72.9 percent of the total population of Forsyth County allocated to District 12 is African-American, while only 11.1 percent of its total population assigned to neighboring District 5 is African-American." (Appellants' J.S. App. at 12a.) In Forsyth County only two precincts with African-American populations less than 40% of the total population were included in the Twelfth District. Those two precincts comprise part of the Twelfth District's land bridge into Forsyth County.[22]

"land bridge" prevents the Twelfth District from cutting the Ninth District in half and thereby making it non-contiguous.

[21] Plaintiff R.O. Everett, a Salisbury resident, testified in minute detail as to how that town had been divided along racial lines. (Tr. at 80-100.)

[22] Hamilton Horton, who represents Forsyth County in the North Carolina Senate, testified that the Twelfth District's boundaries reflected its racial predominance in that area by splitting Winston-Salem along racial lines, noting that the mostly white and Democratic Salem College community was bypassed to reach African-American areas. (*See* Tr. at 32-47).

Similarly, the branch of the district shooting into Guilford County also includes virtually all precincts in that county with an African-American population in excess of 40%.

As the district court found, "where cities and counties are split between the Twelfth District and neighboring districts, the splits invariably occur along racial, rather than political, lines - the parts of the divided cities and counties having a higher proportion of African-Americans are always included in the Twelfth." (*Id.* at 25a.) This observation by the district court is true whether measuring voting performance or party registration. As Dr. Weber testified, his analysis of voting performance was "very consistent" with a registration analysis. (Tr. at 240.)

This can be quickly confirmed by a comparison of the racial percentage map of the Twelfth District, Exhibit 106, and the voting results map of the Twelfth District for the Court of Appeals race.[23] (*See* Ex. 253.) There is some correlation between party and boundaries of the Twelfth District; but this correlation pales in comparison to the precision match between the boundaries of the Twelfth District and the predominately African-American precincts. In mixed motive cases, a line which corresponds more precisely to racial demographic data than partisan demographic data is important evidence of a predominantly race-based district. *See Bush v. Vera,* 517 U.S. 952, 970-75 (1996).

Exhibit 106 and scores of similar maps reviewed by the district court emphatically support its finding that race was the predominant factor in the creation of the Twelfth District. They show exactly why 75% of the district's population is pulled from the extremes of the district, why the district meanders as

[23] According to Gerry Cohen, the primary draftsman for both the 1992 and 1997 plans, the 1988 Court of Appeals race was loaded onto the redistricting computer in order to be an indicator of generic party voting strength. (*See* Cohen Dep. at 49.)

it does, and why it narrows to the width of a single precinct in numerous places.[24]

As the district court found, Dr. Weber "showed time and again how race trumped party affiliation in the construction of the Twelfth District and how political explanations utterly failed to explain the composition of the district." (Appellants' J.S. App. at 26a (citing Tr. at 162-63, 204-05, 221, 251, 262, 288).)

Moreover, as Dr. Weber testified, and as was demonstrated by Congressman Watt's comfortable re-election under the State's 1998 redistricting plan, a solid Democratic performance district can be created without the contortions contained in the Twelfth District.[25] (*See* Tr. at 205, 220-21.)

[24] The district court also had the benefit of hundreds of other maps and other exhibits primarily detailing breakdowns of all the measurements of party performance as recorded in the State's redistricting computer according to precinct, county, and district. While the Republican victory maps in the Appellants' appendix are accurate, they are misleadingly designed. They do not show the corresponding Republican victories *within* the boundaries of the Twelfth District, but only the victories in the immediate precincts outside. Nor do they show relative levels of party support. (*See* Appellants' J.S. App. at 213a-21a.)

[25] Appellants criticize the district court for failing to give proper deference to the General Assembly because it noted that "a much more compact, solidly Democratic Twelfth District could have been created." (Appellants' J.S. at 18 n.21.) However, the Appellants mischaracterize the language and logic of the district court as saying that because such a district could have been created, it should have been created. (*See id.*) In fact, the district court was not dictating any choice to the General Assembly by making this and similar observations. Instead, it was attempting to determine after the fact whether a racial or political motive had predominated. The district court properly considered relevant the fact that the General Assembly did not conform to standard procedures and guidelines usually employed when drawing lines for political reasons, but rather drew a district whose shape and demographic breakdowns conform to patterns usually found when race is the predominant motive.

Approximately 95% of North Carolina African-Americans are loyal Democrats. Consequently, the State's effort to set the Twelfth District's African-American population at just under 50% resulted in making the district so overwhelmingly Democratic that it cannot be explained by partisan purposes.[26] Rather, it was designed to ensure that the vast majority of those voting in the Democratic primary would be African-American and to make sure that an African-American Democratic nominee would win the seat.

B. The Expert Testimony Supported the Finding that Race Predominated in the Formation of the Twelfth District.

Dr. Weber is a nationally recognized expert in redistricting who has been involved in nearly all the major racial gerrymandering cases in the 1990s, as well as numerous other redistricting cases. He also has extensive experience assisting legislators in drawing redistricting plans. In a futile effort to disparage his persuasive testimony in this case, Appellants have made several misstatements to the Court.

First, they claim that the district court had followed Dr. Weber's footsteps in not considering voter performance data. However, as Dr. Weber testified extensively, he analyzed voting performance and the results were "very consistent" with a registration analysis. (Tr. at 240.)

---

[26] The district is also electorally too safe to be explained as a Democratic political gerrymander. (*See* Tr. at 161-63.) Democratic candidates for other elections conducted within the boundaries of the Twelfth District receive voting percentages of 65% or higher. (*See* Tr. at 162.) The election results contained in Dr. Weber's analysis are considerably above the 60% threshold used to determine whether a district provides a safe seat, (*See* Tr. at 162), and they reflect a waste of some Democratic votes in order to achieve a racial goal.

Second, Appellants incorrectly state that the district court, like Dr. Weber, "based its conclusion on an examination of a few select precincts along the district's borders, rather than all of them." (Appellants' J.S. at 20.) In fact, Dr. Weber analyzed every precinct in all six counties of the Twelfth District. (*See* Weber Decl., tbl.5, Ex. 47.)

Third, Appellants insinuate that the only basis of Dr. Weber's opinion that race predominated was his incorrect assumption that the State's computer program had no political data, as was the case for similar software in Louisiana. (Appellants' J.S. at 10 n.13.) However, Dr. Weber's opinion that race predominated was primarily based on the demographic facts of the Twelfth District--not his belief as to what was on the State's computer. Also, before trial, Dr. Weber obtained the correct information concerning the State's computer data and took this data into account when he testified. (*See* Tr. at 261.)

Fourth, Appellants contend that when Dr. Peterson used Dr. Weber's methodology for analyzing the split counties according to partisan as well as racial data, this analysis "established equally conclusively that Democratic performance dictated the splitting of counties and towns in both Districts 12 and 1." (Appellants' J.S. at 10 n.13.) To the contrary, Dr. Weber noted that the racial differences in this data were significantly greater than the political differences. (*See* Tr. at 265-66.) This was also admitted by Appellants' expert, Dr. Peterson, on cross-examination. (*See* Tr. at 507-08.)

Finally, Appellants refer to Dr. Weber as having an "ingrained personal bias," (Appellants' J.S. at 10 n.13), but state that Dr. Peterson is "an unbiased statistical expert."[27] (*Id.* at 21.) In any event, it is not the function of this Court to

---

[27] Ironically, Dr. Peterson was compensated at a rate of $335.00 an hour, which was over twice as much as what Dr. Weber--the alleged "hired gun"--charged for his time.

determine which expert witness was more "biased" or "credible." That was the factfinding function of the district court, which found Dr. Weber's testimony to be convincing.

The district court also recognized that Dr. Weber had "presented a convincing critique of the methodology" used by Dr. Peterson. As it noted:

> Dr. Weber characterized Dr. Peterson's boundary segment analysis as non-traditional, creating "erroneous" results by "ignoring the core" of each district in question. In summary, Dr. Weber found that Dr. Peterson's analysis and report "has not been appropriately done," and was therefore "unreliable" and not relevant.

(Appellants' J.S. App. at 27a (citations omitted).)

Dr. Peterson's rejected analysis--the so-called "segment analysis"--was unprecedented. Not only was he unaware of any application of this analysis to any other political district, (*see* Tr. at 508), but his "segment analysis" had not been presented at any academic institution or published in any scholarly journal for peer review. (Tr. at 509.) Where the analysis had used a number of instances of faulty data--such as data indicating there were over twice as many African-American registered voters as African-Americans residents of a precinct--Dr. Peterson made no attempt to correct that data. (*See* Tr. at 512.)

Upon careful review of Dr. Peterson's work, it was clear he had given no consideration to the "core" of the district. Thus, it was irrelevant to his "segment analysis" whether or not inner precincts in the Twelfth District--precincts not directly on the boundary--were 100% white, 100% African-American, 100% Democrat or 100% Republican. (*See* Peterson Dep. at 70.) Nor did he attempt to take into account the larger scale decisions that went into creating the Twelfth District. (*See*

Peterson Dep. at 63.) Thus, he paid no attention to whether or not the precinct segments he considered involved rural connector precincts or urban core precincts, or whether the General Assembly chose to follow a county boundary in certain areas.[28] (*See* Tr. at 511.) In his "segment analysis," he arbitrarily discounted approximately 80% of the total border precincts which he deemed "convergent." (*See* Tr. at 490.) Moreover, of the segments he did consider, each was given equal weight regardless of population or the relative differences in their respective populations.[29] Instead of counting people, he counted segments and ignored the circumstance that a long land bridge had been constructed to connect large concentrations of African-Americans in Mecklenburg County with similar concentrations in Forsyth and Guilford Counties.[30]

These and many more flaws in Dr. Peterson's "segment analysis" turned his study into a meaningless mathematical exercise unrelated to the demographic realities of the Twelfth District. This exercise does not focus on the areas where racial gerrymandering was possible to see if it in fact occurred. Instead, it submerged these probative precincts in a sea of irrelevant rural corridor precincts where there was no

---

[28] In rejecting Dr. Peterson's analysis, the district court properly followed the guidance given by this Court. *See Bush v. Vera*, 517 U.S. at 972 n.1 (criticizing the dissent for ignoring "the necessity of determining whether race predominated in the redistricters' actions in light of what they had to work with").

[29] For example, with respect to one boundary segment, between High Point Precincts 1 and 4, Dr. Peterson observed that seven African-Americans out of a total registered voter population of 2,114 on the outside was a higher proportion than four out of 1, 212 on the inside. This trivial difference, less than .01%, was used as evidence counting against the "racial hypothesis." (*See* Peterson Dep. at 59-60.)

[30] Prior to the creation in 1992 of the racially gerrymandered Twelfth District, no parts of Mecklenburg and Guilford counties had been combined in a congressional district since 1793.

opportunity to racially gerrymander. Moreover, even if the district court had accepted at face value Dr. Peterson's testimony, the gist of his testimony was that he was unable to determine whether race or party predominated over the other. (Tr. at 487-88.) These admittedly inconclusive results lack evidentiary value.

C. Direct Evidence Produced at Trial Confirms the Overwhelming Circumstantial Evidence that the Twelfth District is Racially Gerrymandered.

Appellees' case is not purely circumstantial as Appellants and Appellant-Intervenors have asserted to the Court in their Questions Presented. Many contemporaneous statements in the legislative record contradict Appellants' *post hoc* rationalizations. Moreover, three leading legislators who were members of the General Assembly when the 1997 Plan was enacted testified specifically that race had been the predominant factor in its creation. Senator Hamilton Horton, who represented Forsyth County, testified that this County and its chief city, Winston-Salem, were split along racial lines, and that the Twelfth District was created predominately with a racial motive. (*See* Appellants' App. at 5a.) Representative Wood, who was the Speaker *pro tem*. of the House, testified that "the 1997 Plan divided High Point and Guilford county along racial lines for a predominantly racial motive." (*Id.* at 6a.) Representative John Weatherly also testified that the Twelfth District was drawn for predominantly racial reasons. (*See id.*)

The "smoking gun" e-mail from Gerry Cohen to Senators Cooper and Winner was also important direct evidence. It referred to moving the "Greensboro Black Community" into the Twelfth District from a prior plan that did not include Greensboro citizens and the resulting need to "take

[a]bout 60,000 out of the 12th."[31] (*Id.* at 8a.) *See also* full text *supra* note 11.

The district court properly found this e-mail demonstrated that the State "had evolved a methodology for segregating voters by race, and that they had applied this method to District 12." (Appellants' J.S. App. 27a.) The district court also found that the e-mail's discussion of plans to "improve" the First District by "boost[ing] the Minority Percentage" of that district was relevant "evidence of the means by which the 1997 Plan's racial gerrymandering could be achieved with scientific precision." (Appellants' J.S. App. at 28a.)

As the district court perceived, some of the testimony of the State's witnesses lacked credibility. For example, the court below doubted the claim by the state's primary witnesses, Senator Cooper and Representative McMahan, that there had been no specific racial target for the Twelfth District.[32] Indeed, the record is replete with indications that the State was attempting to keep the African-American percentage in the Twelfth District close to, but not over, 50% in order to make

---

[31] This e-mail seems readily susceptible to the interpretation that 60,000 African-Americans had just been moved into the district and a corresponding number of whites needed to be taken out.

[32] In footnote 8 of the lower court's opinion, it stated that: "Senator Cooper claimed that the final percentage of District 12 was sheer happenstance. The explicit discussion of precise percentages in the e-mail belies this characterization." (Appellants' J.S. App. at 28a.) Also, the district court found that "exact racial percentages were used when constructing districts." (*Id.*) This was also shown by Representative McMahan's statement to his colleagues that "we have done our best--our dead level best--to draw two Districts that are fair racially and do have one of them the majority of the population and the other one over 46%, and that's the very best we could do on both sides, and we looked at this very, very closely." House Floor Statement of Rep. McMahan, March 26, 1997 97C - 28F - 4F(1), (Ex. 100).

the district immune to constitutional challenge.[33] The district court concluded that Senator Cooper's allusion to the need for "racial and partisan balance" in the legislative record also bolstered plaintiffs' claim that race predominated in the creation of District 12. (Appellants' J.S. App. at 27a.) The district court specifically found that Senator Cooper's "contention that although he used the term 'partisan balance' to refer to the maintenance of a six-six Democrat-Republican split in the congressional delegation, he did not mean the term 'racial balance' to refer to the maintenance of a then ten-two balance between whites and African-Americans is simply not

---

[33] Senator Cooper said:

> I believe that this new 12th District is constitutional for several reasons. First, and maybe most importantly, when the Court struck down the 12th District it was because the 12th District was majority-minority and it said that you cannot use race as the predominant factor in drawing the districts.
>
> Well guess what! **The 12th District, under this plan, is not majority-minority. Therefore it is my opinion and the opinion of many lawyers that the test outlined in *Shaw v. Hunt* will not even be triggered because it is not a majority-minority district and you won't even look at the shape of the district in considering whether or not it is constitutional.** That makes an eminent amount of sense because what is the cutoff point for when you have the trigger of when a district looks ugly? I think that the court will not even use the shape test, if you will, on the 12th District because it is not majority minority. It is strong minority influence, and I believe that a minority would have an excellent chance of being elected under the 12th District.
>
> Mar. 27, 1997 Floor Debate of HB 586 in Senate Chamber, 97C-28F-4F(2) at 5-6 (emphasis added) (Ex. 100).

credible."[34] (*Id.*)

II. THE TWELFTH DISTRICT FAILS THE STRICT SCRUTINY TEST.

Appellant-Intervenors now contend that "The District Court Erred by Failing to Determine Whether the State Had a Compelling Justification for Creating a Narrowly Tailored District 12." (Appellant-Intervenor's J.S. at 22.) This argument is frivolous.

Neither Appellants nor Appellant-Intervenors presented any factual or legal contention that a compelling government interest supported the creation of the Twelfth District. Also, the Appellants made quite clear at the opening of trial that they were not claiming that the Twelfth District was supported by a compelling state interest. Specifically, the Appellants' lead counsel--with no dissent from Appellant-Intervenors' attorneys sitting at her side--stated, "we're not arguing compelling state interest" with regard to the Twelfth District. (Tr. at 30-31.) Counsel for the Appellant-Intervenors only briefly addressed the Twelfth District in his closing argument. He stated flatly that "Ms. Smiley [Appellants' counsel] covered our position." (Tr. at 595.) Further he stated that "once we understood the law after *Shaw v. Hunt*, that there couldn't be--there was no basis for a majority-minority district in the 12th." (Tr. at 596.) Thus, the district court correctly found that "no evidence of a compelling state interest in utilizing race to create the new 12th District has been presented and even if such interest did exist, the 12th District is not narrowly tailored and therefore cannot survive the prescribed 'strict scrutiny.'" (Appellants' J.A. App. at 29a.)

---

[34] The evasiveness and lack of candor of Appellants' witnesses was both impeaching evidence and substantive evidence against Appellants' claim. *Cf. McQueeney v. Wilmington Trust Co.*, 779 F.2d 916 (3rd Cir. 1985).

III. APPELLANTS' CLAIM PRECLUSION ARGUMENT LACKS MERIT.

Appellants rely for preclusion on an order entered on September 12, 1997, in the *Shaw* litigation which allowed use of the 1997 Plan as a remedy for the violation of the rights of those *Shaw* plaintiffs who were registered voters in the 1992 Plan's Twelfth District. The terms of the order make clear that it did not intend to adjudicate challenges of the constitutionality of the 1997 Plan made by persons who had not been held to be entitled to relief in the *Shaw* litigation. Thus, to preclude Appellees' claim would give the order an effect never intended by the *Shaw* court.

Furthermore, claim preclusion requires (1) a final judgment on the merits, (2) the same claim or claims, (3) and the same parties. *See Federated Dept. Stores, Inc. v. Moite*, 452 U.S. 394, 398 (1981); *Cromwell v. County of Sac*, 94 U.S. 351 (1876). Here none is present. The language of the Memorandum Opinion entered by the *Shaw* court on September 12, 1997, leaves no doubt that the Court was not rendering a "final judgment" as to the constitutionality of the 1997 Plan's Twelfth District. Instead, it only decided that the Twelfth District was an adequate remedy for violating the Equal Protection rights of those *Shaw* plaintiffs who resided in the 1992 Plan's Twelfth District. Since the 1997 Plan removed those persons and their entire county from the Twelfth District, their claim is quite different from challenges of the 1997 Plan's Twelfth District by registered voters in that District. The parties also are not the same. *Cf. U.S. v. Hays*, 515 U.S. 737 (1995). Appellees J.H. Froelich and R.O. Everett, who live in the 1997 Plan's Twelfth District, were not parties to the *Shaw* litigation; and therefore were in no way precluded by the *Shaw* panel's order of September 12, 1997.

In a futile effort to overcome this last defect, Appellants

invoke a theory of "virtual representation." They contend that plaintiffs Froelich and R.O. Everett had been "virtually represented" by attorney Robinson O. Everett, who is counsel of record in the *Cromartie* case and had been a plaintiff in the *Shaw* litigation. This contention overextends virtual representation. *See, e.g., Klugh v. United States*, 818 F.2d 294 (4th Cir. 1987). Also, it ignores the circumstance that, under the holding in *Shaw v. Hunt*, 517 U.S. at 904, Robinson Everett lacked standing to be a plaintiff in that case because he did not reside within the 1992 Plan's Twelfth District. Thus, he could not have "represented" the interests of Froelich and of his cousin, R.O. Everett, even had he sought to do so. The Court should reject the Appellants' defense of claim preclusion as has every judge who has considered it.

IV. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN PROHIBITING FURTHER USE OF THE TWELFTH DISTRICT

Appellants and Appellant-Intervenors contend that the lower court abused its discretion by prohibiting use of the 1997 Plan's Twelfth District in an election after it had been held unconstitutional. Appellant-Intervenors cite some cases in which district courts exercised their discretion to delay imposing a remedy for an upcoming election. (Appellant-Intervenors J.S. at 25-27.) However, they have not cited--and Appellees cannot find--any case where a district court had abused its discretion by enjoining the use of an unconstitutional redistricting or reapportionment plan.

"[O]nce a State's legislative apportionment scheme had been found to be unconstitutional, it would be the unusual case in which a Court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The district court was well aware that this was not "the unusual

case." *Id.* Familiar with the history underlying this case, the district court recognized that Appellants had consistently refused over many years to enact a race-neutral redistricting plan. If any "equitable considerations" were present, they pointed toward granting immediate relief to the Appellees, rather than to delay. The district court was well aware that Appellants' did not have clean hands because they had used *post hoc* rationalizations to obscure the true facts, had offered explanations that were "not credible," (Appellants' J.S. App. at 27a), and had been steadfastly "defending the indefensible." *Hays v. Louisiana*, 936 F.Supp. 360, 372 (W.D. La. 1996).

Had the Appellants done the right thing and drawn a constitutional plan in 1993 after the Court's first decision, they would not be in the situation of which they now complain. However, as in Louisiana, Appellants have reacted to the Court's decisions, not by repudiating racial gerrymandering, but by adopting a new plan with a "physically modified but conceptually indistinguishable 'new' [district], again violating historical political subdivisions and ignoring other traditional redistricting criteria." *Id.* at 372. Appellants' shameless appeal to the lateness of the decade deserves a firm rebuke from this Court.[35]

The district court knew from the 1998 experience that the State has the capacity to organize and conduct a special Congressional primary in the Fall if it chooses to do so. Moreover, the district court was undoubtedly aware that many states hold their entire primary and general election cycle in the Fall, and that there is a "typical post-Labor Day focus" to most political campaigns. *See Vera v Bush*, 933 F.Supp. 1341, 1351

[35] In closing argument Appellants' lead counsel accused Appellees of laches. This evoked from Judge Boyle the observation that "[Y]ou can't make the argument that the decade has run when you have been fighting this the entire last eight years." (Tr. at 586.)

(S.D. Tex. 1996).[36]

The district court was further aware of the danger that if the unconstitutional district were used in the 2000 election, the State and the Department of Justice might seek to use it as a benchmark for the drawing of districts for the year 2002 and thereafter.

Finally, the district court was aware that after three elections under a flagrantly gerrymandered Twelfth District as created by the 1992 Plan, the 1998 elections had been conducted in a district that adhered much more to traditional race-neutral principles. Undoubtedly, the district court realized that to allow initial use in the 2000 election of the unconstitutional 1997 Plan that has twice been held unconstitutional and is clearly more racially gerrymandered than the plan used in the 1998 election would be an insult to the Equal Protection rights of the Appellees and other registered voters of the Twelfth District, would offend fair-minded persons, and would enhance distrust of both the electoral process and the judicial process.

Appellants have engaged in legislative and legal maneuvers which deserve no reward from the Court. Indeed, if the Court allows this meritless appeal to go forward for argument in the next Term, Appellants' tactics of delay provide them an outcome--use of the 1997 Plan--which is entirely at odds with the result of the trial which this Court ordered in May 1999. The Court should make it clear that delaying tactics will not succeed in attaining unconstitutional objectives.

[36] In 1996, in Texas a primary election was set aside and a special election held in thirteen redrawn districts in conjunction with the high-turnout Presidential election, and a run-off in those few districts which required it. *See Vera*, 933 F.Supp. at 1351. If that remedy was within the equitable discretion of a district court, surely enjoining in March 2000 the first use of the unconstitutional 1997 Plan was within the discretion of the court.

CONCLUSION

For the above stated reasons the Court should grant Appellees' motion for summary affirmance of the decision below, or in the alternative dismissal of the appeal.

Respectfully submitted,

MARTIN B. McGEE
WILLIAMS, BOGER
GRADY, DAVIS & TUTTLE
708 McLain Rd.
Kannapolis, NC 28081
(704) 932-3157

ROBINSON O. EVERETT*
SETH A. NEYHART
EVERETT & EVERETT
P.O. Box 586
Durham, NC 27702
(919) 682-5691

DOUGLAS E. MARKHAM
P.O. Box 130923
Houston, TX 77219-0923
(713) 655 - 8700

*Counsel of Record

Attorneys for Appellees

May 25, 2000

Supreme Court, U.S.
FILED
SEP 7 - 2000
CLERK

(10) (11)

Nos. 99-1864 and 99-1865

In the
Supreme Court of the United States

JAMES B. HUNT, JR., *et al.*,
Appellants,

and

ALFRED SMALLWOOD, *et al,*
Appellant-Intervenors,

v.

MARTIN CROMARTIE, *et al.*,
Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

JOINT APPENDIX
Volume I of II
(pages 1 through 482)

[Counsel listed on inside front cover]

APPEAL DOCKETED MAY 23, 2000
PROBABLE JURISDICTION NOTED JUNE 26, 2000

MICHAEL F. EASLEY
NC Attorney General
Tiare B. Smiley*
Norma S. Harrell
NC Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
Telephone: (919) 716-6900

Counsel for Appellants

Adam Stein
Ferguson Stein Wallas
Adkins Gresham & Sumter
312 W. Franklin Street
Chapel Hill, NC 27514
Telephone: (919) 933-5300

Todd Cox*
NAACP Legal Defense &
Educational Fund, Inc.
1444 I Street NW
Washington, DC 20005
Telephone: (202) 682-1300

Counsel for Appellant-
Intervenors

Robinson O. Everett*
Seth Neyhart
Everett & Everett
Post Office Box 586
Durham, NC 27702
Telephone: (919) 682-5691

Martin B. McGee
Williams, Boger, Grady,
Davis & Tuttle, P.A.
Post Office Box 2
Kannapolis, NC 28082
Telephone: (704) 932-3157

Douglas E. Markham
Post Office Box 130923
Houston, TX 77219-0923
Telephone: (713) 655-8700

Counsel for Appellees

*Counsel of Record

TABLE OF CONTENTS

VOLUME I

Chronological List of Relevant Docket Entries 1

Stipulations from Pre-Trial Order (excerpts) 15

TRIAL TRANSCRIPT EXCERPTS

Opening Statement of Tiare B. Smiley 23

Hamilton Horton 25

Steven Ray Wood 33

John Hush Weatherly 45

Reuben Oscar Everett 55

J. H. Froelich 65

Neil Carson Williams 69

Dan Frey 77

Dr. Ronald E. Weber 81

Roy A. Cooper, III 179

W. Edwin McMahan 231

Dr. David W. Peterson 245

Gerry Cohen 261

Closing Argument of Adam Stein 269

EXHIBITS

Type P Divergent Segments (Exhibit 23) 271

Type R Divergent Segments (Exhibit 24) 273

Summary of Divergent Precincts and Segments
(Exhibit 25) 275

Declaration of Ronald E. Weber (excerpts)
(Exhibit 47) 277

February 10, 1997 E-mail from Gerry Cohen
(Exhibit 58) 369

North Carolina Section 5 Submission for 1997
Congressional Redistricting Plan
(Exhibit 100) (excerpts)

Information Supporting North Carolina's
Section 5 Submission (excerpts) 371

Section 97C-28F-4D(2) Senate Committee
Minutes (February 20, 1997) 391

Section 97C-28F-4D(3) Senate Committee
Minutes (March 19, 1997) 405

Section 97C-28F-4E(1) House Committee
Minutes (February 12, 1997) (excerpts) 439

Section 97C-28F-4E(2) House Committee

Minutes (February 25, 1997) 443

Section 97C-28F-4E(3) House Committee
Minutes (March 19, 1997) (excerpts) 453

Section 97C-28F-4E(4) House Committee
Minutes (March 25, 1997) (excerpts) 459

Section 97C-28F-4F(1) House Floor
Debate (excerpts) 463

Section 97C-28F-4F(2) Senate Floor
Debate) (excerpts) 473

VOLUME II

Map of Precincts by Percent of Population Black
with Congressional District Line Overlay
(Exhibit 106) 483

Forsyth Precincts by Percent of Population Black
with Democratic Registration Values
(Exhibit 108) 484

North Carolina Counties by Percent of Population
Black with 12th Congressional District Overlay
(Exhibit 124) 485

Congressional District 12 - 1992 versus 1997
(Exhibit 139) 486

Forsyth County Precinct Map (Exhibit 143) 487

Guilford County Precinct Map (Exhibit 144) 488

District 12 Region Precincts by Percent Democrat Vote in 1988 Court of Appeals Race (Exhibit 253) 489

Forsyth County Voter Precincts by Percent Democratic Vote in 1988 COA Race (Exhibit 255) 490

Guilford County Precincts by Percent Democratic Vote in 1988 COA Race (Exhibit 256) 491

Mecklenburg County Precincts by Percent Democratic Vote in 1988 COA Race (Exhibit 258) 492

District 12 Region Precincts by Percent Democratic Vote in 1990 Senate Race (Exhibit 263) 493

Forsyth County Voter Precincts by Percent Democrat Vote in 1990 Senate Race (Exhibit 265) 494

Guilford County Voter Precincts by Percent Democrat Vote in 1990 Senate Race (Exhibit 266) 495

Mecklenburg County Voter Precincts by Percent Democrat Vote in 1990 Senate Race (Exhibit 268) 496

North Carolina 1990 Population Density (By Block Group) (Exhibit 270) 497

Map of 1980s Congressional Districts in North Carolina (Exhibit 288A) 498

Map of [1970s] Congressional Districts (11 Districts) (Exhibit 289) 499

Comparative Map[s] of the 12th District, from 98C-27A-3C (1998 Section 5 Submission) (Exhibit 305)

1992 Congressional Plan 500

97 House/Senate Plan A 501

98 Congressional Plan A 502

A Chronology on North Carolina Redistricting in the 1990s (Exhibit 306) (excerpts) 503

Proportion of Precincts in Six Counties That Are in Congressional District 12, 1997 Plan (Exhibit 309) 515

Photograph of Default Screen in Plan90 (Exhibit 402) 517

Photograph of Plan90 Screen Showing County with Precinct with Precinct Lines and Data Window Sized as Generally Used (Exhibit 405) 518

Photograph of Plan 90 Screen Showing Democrat Percentage Labels (Exhibit 411) 519

Photograph of Plan90 Screen Showing Data Window for a Precinct (Exhibit 416) 520

An Evaluation of North Carolina's 1998 Congressional Districts [1997 Plan], Gerald R. Webster, PhD (Exhibit 421) (excerpts) 521

Addendum to "An Evaluation of North Carolina's 1998 Congressional Districts [1997 Plan]," Gerald R. Webster, PhD (Exhibit 426) (excerpts) 549

Third Affidavit of David W. Peterson, PhD (Exhibit 429) 555

Guilford County Precincts "Excluded" By Elm and Lee Streets (Exhibit 437) 575

DEPOSITION TRANSCRIPT EXCERPTS

Don Nichols Baker 577

Gerry Farmer Cohen 585

Roy Asberry Cooper, III 641

J. H. Froelich 671

Linwood Lee Jones 687

William Edwin McMahan 697

David Peterson, PhD 711

Ronald E. Weber, PhD 743

Gerald R. Webster, PhD 765

Leslie Winner 769

OTHER

Materials from *Shaw v. Hunt*, No. 92-202-CIV-5-BR

Defendants' Motion to Consolidate, October 14, 1997 791

Defendants' Memorandum in Support of Motion to Consolidate, October 14, 1997 797

Order [denying motion to consolidate], October 16, 1997 803

Trial Testimony of Gerry Cohen (excerpts) 805

Deposition Transcript of Gerry Cohen (excerpts) 815

Materials from *Pope v. Blue*, No. 3:92-CV-71-PR

Deposition Transcript of Gerry Cohen (excerpts) 821

[This page intentionally left blank.]

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	CD#	ENTRY
7/3/96	1	Complaint
7/12/96	5/6	Motion with memorandum by Smallwood, Ward, Moore, Waddle and Hodges to intervene as defendants
8/27/96	10	Plaintiffs' motion to stay action
9/4/96	12	Order granting motion to stay
4/8/97	13	Plaintiffs' motion to extend stay
4/18/97	14	Order granting motion to extend stay
6/2/97	15	Plaintiffs' unopposed motion to extend stay
6/11/97	16	Order granting motion to extend stay
8/11/97	17	Plaintiffs' unopposed motion for further extension of stay
8/19/97	18	Order granting motion for further extension of stay
10/10/97	19	Plaintiffs' motion to dissolve stay
10/17/97	20	Order granting motion to dissolve stay
10/17/97	21	Amended complaint
10/17/97	22	Notice of voluntary dismissal by plaintiff Weeks
11/25/97	26	Answer to amended complaint
11/26/97	27/28	Motion with memorandum by Smallwood, Moore, Hodges, Davis, Valder, Offerman, Newell, Lambeth and Simkins to intervene as defendants
12/22/97	29	Plaintiffs' motion to amend complaint

1/15/98	31	Order, reassigning/referring case to Chief Judge Boyle
1/23/98	32	Designation of Three-Judge Court
1/30/98	33	Plaintiffs' motion for preliminary injunction
2/5/98	34/35	Plaintiffs' motion for summary judgment with memorandum and affidavits of Mortimer, Weatherley, Froelich and Everett
2/10/98	37	Defendants' motion to strike preliminary injunction motion for lack of supporting memorandum
2/17/98	38	Plaintiffs' response to motion to strike
2/18/98	39	Defendants' reply to plaintiffs' response to motion to strike
2/20/98	--	Notice of motion hearing for March 16, 1998 re: motion for preliminary injunction
2/23/98	40	Plaintiffs' memorandum in support of motion for preliminary injunction
2/25/98	41	Defendants' motion to consolidate preliminary injunction hearing with hearing on cross-motions for summary judgment
3/2/98	42/43	Movant - defendant intervenors' response to motion for summary judgment and memorandum
3/2/98	44/45	Defendants' motion for summary judgment and memorandum
3/2/98	45	Defendants' response to motion for summary judgment

3/2/98	46	Defendants' affidavit of Bartlett in support of motion for summary judgment and in response to motion for summary judgment
3/2/98	47	Defendants' affidavits of Cooper, McMahan, Goldfield, Peterson, Stuart and Webster in support of motion for summary judgment
3/2/98	48	Defendants' motion to strike affidavits of Everett, Froelich, Williams, Weatherley and Mortimer, with memorandum
3/5/98	49	Plaintiffs' motion to continue preliminary injunction hearing and time for filing materials
3/19/98	50	Order granting motion to continue preliminary injunction and time for filing
3/20/98	51/52	Defendants' response to motion for preliminary injunction with supporting affidavits of Jones, Myrick, Taylor, Clayton, Etheridge, Price and Bartlett
3/23/98	53	Movant - defendant intervenors' response to motion for preliminary injunction
3/23/98	54	Plaintiffs' response to motion to strike affidavits of Everett, Froelich, Williams, Weatherley and Mortimer
3/23/98	55	Plaintiffs' response to motion for summary judgment
3/23/98	55	Plaintiffs' supplemental memorandum in support of motion for summary judgment and motion for preliminary injunction

3/23/98	57	Plaintiffs' declaration of Weber and affidavits of Everett, Darling, Cirincione, O'Rourke and McGee in support of motion response, motion for summary judgment and motion for preliminary injunction
3/23/98	58	Affidavit of Thomas Darling by plaintiffs
3/23/98	59	Affidavit of Carmen Cirincione by plaintiffs
3/23/98	60	Affidavit of Timothy O'rourke by plaintiffs
3/23/98	61	Affidavit of Martin McGee by plaintiffs
3/23/98	62	Plaintiffs' motion to strike affidavits of Cooper and McMahan
3/23/98	64	Plaintiffs' motion for judicial notice of computer data
3/27/98	66	Defendants' response to plaintiffs' motion for judicial notice of computer data
3/31/98	--	Hearing: motions for summary judgment and motion for preliminary injunction
3/31/98	68	Notice of appearance by Cox, Hodgkiss and Stein for movant defendant-intervenors
3/31/98	69	Subsequently decided authority pursuant to LR 4.07 by defendants
4/3/98	70	Order granting plaintiffs' motion for summary judgment as to twelfth congressional district, granting preliminary injunction and granting permanent injunction
4/6/98	71	Judgment for plaintiffs
4/6/98	72	Defendants' motion for stay of April 3 court order

4/6/98	73	Order denying stay
4/6/98	74	Defendants' notice of appeal
4/8/98	77	Defendants' amended notice of appeal
4/14/98	79	Findings of fact and conclusions of law re: April 3, 1998 order and order denying plaintiffs' motion for summary judgment as to first congressional district
4/14/98	80	Judgment re: first congressional district
4/17/98	82/83	Defendants' motion for reconsideration of order denying stay and to shorten time for plaintiffs' response, with memorandum
4/20/98	84	Plaintiffs' response to defendants' motion for reconsideration of order denying stay and motion to shorten time for plaintiffs' response
4/20/98	85	Response by plaintiffs to motion for reconsideration of order denying the stay, motion to shorten time for plaintiffs to respond
4/21/98	88	Order denying motion for reconsideration of order denying stay, mooting motion to shorten time for plaintiffs to respond
4/21/98	89	Order on scheduling
5/22/98	94	Defendants' submission of 1998 congressional redistricting plan
5/26/98	95/96	Renewed motion by Smallwood, Moore, Hodges, Davis, Valder, Offerman, Newell, Lambeth and Simkins to intervene as defendants, with memorandum
5/27/98	97	Defendants' response to motion to intervene as defendants
5/27/98	98	Plaintiffs' response in opposition to revised 1998 redistricting plan

6/1/98	100	Defendants' response in support of 1998 redistricting submission and in opposition to plaintiffs' objections
6/1/98	101/102 103/104	Defendants' affidavits of Cooper (2d), McMahan (2d), Cohen, and Bartlett (3d) re: memorandum in support of 1998 redistricting plan
6/9/98	105	Motion by USA to file amicus brief w/attached amicus brief, with memorandum
6/11/98	107	Response by plaintiffs to USA's motion to file amicus brief, w/attach. Response to Amicus Brief, if the brief is allowed.
6/22/98	109	Order granting motion to file amicus brief by USA
6/22/98	110	Amicus Curiae Brief by USA
6/22/98	111	Order granting motion to intervene as defendants (Smallwood, Moore, Hodges, Davis, Valder, Offerman, Newell, Lambeth and Simkins)
6/22/98	112	Order directing: 1998 congressional elections proceed as scheduled in court's April 21, 1998 order; proceed with discovery and trial; parties to submit discovery schedules by June 30
7/17/98	114	Plaintiffs' notice of appeal
7/22/98	115/116	Defendants' motion to consolidate case with Daly and to shorten time to respond to motion to consolidate, with memorandum
7/27/98	117	Plaintiffs' response to motion to shorten time to respond to motion to consolidate

8/11/98	118	Plaintiffs' response in opposition to motion to consolidate case with *Daly*
8/17/98	119	Defendants' reply to response to motion to consolidate case with *Daly*
10/1/98	120	Joint motion by plaintiffs, defendants and defendant-intervenors to stay all proceedings until the Supreme Court renders a decision in *Hunt v. Cromartie*
10/5/98	--	Clerk notation that an appeal in this case was docketed in the Supreme Court on September 16, 1998 as No. 98-450
10/19/98	121	Order granting joint motion to stay all proceedings pending a decision by the U.S. Supreme Court in *Hunt v. Cromartie*, 98-85
5/21/99	122	Opinion from United States Supreme Court: Judgment Reversed
6/21/99	123	Certified copy of judgment of United States Supreme Court
7/14/99	124	Plaintiffs' motion to dissolve stay, schedule discovery, expedite the trial, with attached proposed discovery plan
7/14/99	125	Discovery plan by all parties
7/20/99	126	Defendants' withdrawal of motion to consolidate case with *Daly*
8/23/99	128	Order granting motions to dissolve stay, schedule discovery, expedite the trial and resetting discovery, motion filing deadline, and bench trial
8/25/99	129/130	Defendants' motion to amend answer to amended complaint, with memorandum

8/31/99	131	Order granting motion to amend answer to amended complaint. A ninth defense is added which states that plaintiffs have failed to state a claim for relief on the grounds that their claims are barred by the Doctrine of Claim Preclusion
8/31/99	132	Notice of attorney appearance as 2.05 counsel for plaintiffs by Douglas Markham, Houston, TX.
8/31/99	133	Plaintiffs' motion to amend amended complaint by substituting plaintiff Lois Weaver in place of Robert Weaver (now deceased)
9/13/99	134	Order granting motion to amend amended complaint. Lois Weaver is substituted for her late husband, Robert Curtis Weaver
9/28/99	135	Stipulation of dismissal as to plaintiff Susan Hardaway with prejudice
9/30/99	136	Notice of attorney appearance for plaintiffs by Robert Popper, New York, NY
10/12/99	137/138	Plaintiffs' motion to amend the complaint re: plaintiff Linville, with memorandum
10/18/99	139/140	Defendants' motion for summary judgment based on claim preclusion, with memorandum
10/18/99	140	Defendants' response to motion to amend the complaint re: plaintiff Linville
10/18/99	141/142	Plaintiffs' motion in limine to exclude the testimony of David West Peterson, with memorandum

10/20/99	144	Designation of Three-Judge Court adding Judge Lacy Thornburg to the panel of Judge Terrence Boyle and Judge Richard Voorhees
10/22/99	145	Order continuing trial from 11/1/99, to be rescheduled by further order
11/2/99	147	Notice of attorney appearance for plaintiffs by Seth Allen Neyhart as LR 2.05 counsel
11/8/99	148/149	Plaintiffs' motion for partial summary judgment as to the affirmative defense of claim preclusion, with memorandum
11/8/99	149	Plaintiffs' response to motion for summary judgment
11/8/99	150	Defendants response to motion in limine to exclude the testimony of David West Peterson
11/12/99	151	Defendant-intervenors' response to motion in limine to exclude the testimony of David West Peterson
11/12/99	152/153	Motion by Cass Ballenger, Howard Coble, Richard Burr, Sue Myrick, Walter Jones, Robin Hayes, and Charles Taylor to file amicus brief and make argument, with memorandum
11/17/99	156	Plaintiffs' reply to response to motion in limine to exclude the testimony of David West Peterson.
11/17/99	157	Order granting motion to file amicus brief and make argument

11/17/99	157	Order setting bench trial before Chief Judge Terrence W. Boyle, Judge Voorhees and Judge Thornburg for Monday, November 29, 1999 through December 2, 1999. Pretrial is to be complete by November 24, 1999.
11/22/99	158	Defendants' reply to response to motion for summary judgment
11/24/99	--	Deposition of Joel K. Bourne taken on 10/4/99
11/24/99	--	Deposition of Martin Luther Cromartie taken on 9/22/99
11/24/99	--	Deposition of Reuben Oscar Everett taken on 10/1/99
11/24/99	--	Deposition of Jacob Henry Froelich, Jr. taken on 9/30/99
11/24/99	--	Deposition of James Ronald Linville taken on 9/30/99
11/24/99	--	Deposition of Thomas Chandler Muse taken on 10/4/99
11/24/99	--	Deposition of Alma Lois Weaver taken on 10/4/99
11/24/99	--	Exhibits to the depositions docketed on 11/24/99
11/24/99	159	Initial pretrial order
11/29/99	160	Final pretrial order
11/29/99	--	Deposition of Don Nichols Baker taken on 10/7/99
11/29/99	--	Deposition of Gerry Farmer Cohen taken on 9/17/99
11/29/99	--	Deposition of Roy Asberry Cooper, III taken on 9/9/99

11/29/99	--	Deposition of Linwood Lee Jones taken on 9/22/99
11/29/99	--	Deposition of David West Peterson taken on 9/20/99
11/29/99	--	Deposition of William Edwin McMahan taken on 10/1/99
11/29/99	--	Deposition of Gerald Raymond Webster taken on 10/2/99
11/29/99	--	Deposition of Charles Joseph Worth taken on 10/18/99
11/29/99	--	Bench trial held on Monday, November 29, 1999 before Judge Lacy Thornburg (presiding), Chief Judge Terrence W. Boyle and Judge Richard Voorhees, sitting
11/29/99	--	Oral order denying motion for leave to file amicus brief, denying motions, etc.
11/30/99	--	Transcript filed - bench trial proceedings on 11/29/99
11/30/99	--	Bench trial held on Tuesday, November 30, 1999 before Judge Lacy Thornburg (presiding), Chief Judge Terrence W. Boyle and Judge Richard Voorhees, sitting
11/30/99	--	Oral order by the panel granting motion to amend the complaint re: plaintiff Linville. The defendants' motion for summary judgment as to Linville is denied.
12/1/99	--	Transcript filed - bench trial proceedings on 11/30/99
12/1/99	161	Defendants'/defendant-intervenors' addendum to final pretrial order re: designation of deposition of Dr. Ronald Weber.

12/1/99	--	Deposition of Ronald E.Weber taken on 9/27/99
12/1/99	--	Deposition of Ronald E. Weber taken on 10/18/99.
12/1/99	--	Bench trial held on Wednesday, December 1, 1999 before Judge Lacy Thornburg (presiding), Chief Judge Terrence W. Boyle and Judge Richard Voorhees, sitting. Evidence closed and final argument heard.
12/2/99	--	Transcript filed - bench trial proceedings on 12/2/99
12/8/99	162	Amicus curiae brief by Republican congresspersons
3/7/00	164	Findings of act and conclusions of law signed by Boyle, CJ for the majority (Boyle and Voorhees). Concurrence and Dissent (Thornburg)
3/8/00	165	Judgment signed by Skinner, deputy clerk
3/10/00	166	Defendants' motion to stay the injunction so that the congressional elections can proceed.
3/10/00	167	Defendants' notice of appeal to Supreme Court
3/13/00	168	Plaintiffs' response to motion to stay the injunction
3/13/00	169/170	Defendant-intervenors' motion to stay the injunction, with memorandum
3/13/00	172	Order denying defendants' motion to stay the injunction
3/13/00	171	Defendant-intervenors'notice of appeal to Supreme Court
3/14/00	173	Judgment on motion to stay.

3/20/00	174	Plaintiffs' motion for attorney fees. Request that fees be deferred until final adjudication.

[This page intentionally left blank.]

STIPULATIONS FROM PRE-TRIAL ORDER (EXCERPTS)

24. Based on the 1990 Federal Census, 21.97% of the State's total population is African-American.
25. Based on the 1990 Federal Census, 20.07% of the State's voting age population is African-American.
26. District 12 in the 1997 plan is 46.67% African-American in total population and 43.36% African-American in voting age population.
27. District 1 in the 1997 plan is 50.27% African-American in total population and 46.54% African-American in voting age population.
28. In creating the 1997 Plan, the General Assembly split 22 counties.
29. Six of six counties were split in creating District 12 in the 1997 Plan.
30. While District 12 in the 1992 Plan contained parts of 10 counties, District 12 in the 1997 Plan contains parts of six counties.
31. Of the total population of Congressional District 12 in the 1997 plan, approximately 75% percent comes from parts of Mecklenburg, Forsyth and Guilford counties.
32. District 12 divides the populations of eight cities (Charlotte, Greensboro, High Point, Lexington, Salisbury, Statesville, Thomasville and Winston-Salem).
33. The dispersion compactness score of District 12 was 0.045 in the 1992 Plan.
34. The dispersion compactness score of District 12 is 0.109 in the 1997 Plan.

35. Approximately 25.7% of the African-Americans who were in District 12 in the 1992 plan were moved out of District 12 in the 1997 plan. Approximately 74.3% of the African-Americans who were in District 12 in the 1992 plan continue to be in District 12 in the 1997 plan.

36. Approximately 31.6% of all persons who were in District 12 in the 1992 plan were moved out of District 12 in the 1997 plan. Approximately 68.4% of all persons who were in District 12 in the 1992 plan continue to be in District 12 in the 1997 plan.

37. 41.6% of the geographic area assigned to District 12 in the 1992 Plan remained assigned to District 12 in the 1997 Plan.

* * *

40. On average, 76.4% of the geographic area in each of North Carolina's twelve congressional districts in the 1992 Plan was in the corresponding districts in the 1997 Plan, ranging from a high of 96.7% for District 11 to a low of 41.6% for District 12.

* * *

48. Each of the districts of the 1997 Plan is composed of contiguous territory.

* * *

52. For purposes of one person, one vote, a plan with almost zero deviation would contain approximately 552,386 persons in each of North Carolina's 12 congressional districts, based on the 1990 Federal Census.

53. Registered Democrats are prohibited from voting in Republican primaries and registered Republicans are prohibited from voting in Democratic primaries at the present time, and during all times relevant to this case.

54. Guilford County Precinct 11 is not within District 12 but is contiguous to that district. The precinct is 17.57% African-American in total population and 17.89% African-American in voting age population. Democrats comprise 62.32% of registered voters. Within this precinct, the Democratic candidate Gantt received 67.51% of the vote in the 1990 senatorial contest, the Democratic candidate Rand received 61.68% of the vote in the 1988 Lt. Governor contest, and the Democratic candidate Lewis took 52.98% of the vote in the 1988 Court of Appeals contest.

55. Guilford County Precinct 14 is not within District 12 but is contiguous to that district. The precinct is 15.19% African-American in total population and 15.24% African-American in voting age population. Democrats comprise 58.14% of the registered voters. Within this precinct, the Democratic candidate Gantt received 86.91% of the vote in the 1990 senatorial contest, the Democratic candidate Rand received 65.66% of the vote in the 1988 Lt. Governor contest,

and the Democratic candidate Lewis took 63.92% of the vote in the 1988 Lewis/Smith Court of Appeals contest.

56. Guilford County precinct 17 is not within District 12 but is contiguous to that district. The precinct is 9.09% African-American in total population and 8.64% African-American in voting age population. Democrats comprise 61.86% of the registered voters. Within this precinct, the Democratic candidate Gantt received 65.08% of the vote in the 1990 senatorial contest, the Democratic candidate Rand received 61.68% of the vote in the 1988 Lt. Governor contest, and the Democratic candidate Lewis took 58.19% of the vote in the 1988 Lewis/Smith Court of Appeals contest.

57. Forsyth County Brunson Elementary School Precinct is not within District 12 but is contiguous to that district. The precinct is 27.83% African-American in total population and 25.88% African-Americanin voting age population. Democrats comprise 65.75% of the registered voters. Within this precinct, the Democratic candidate Gantt received 75.46% of the vote in the 1990 senatorial contest, the Democratic candidate Rand received 66.30% of the vote in the 1988 Lt. Governor contest, and the Democratic candidate Lewis took 65.84% in the 1988 Lewis/Smith Court of Appeals contest.

58. Forsyth County Hanes Community Center precinct is not within District 12 but is contiguous to that district. The precinct is 32.06% African-American in total

population and 28.80% African-Americanin voting age population. Democrats comprise 76% of the registered voters. Within this precinct, the Democratic candidate Gantt received 75.77% of the vote in the 1990 senatorial contest, the Democratic candidate Rand received 71.68% of the vote in the 1988 Lt. Governor contest, and the Democratic candidate Lewis took 69.18% of the vote in the 1988 Lewis/Smith Court of Appeals contest.

59. Forsyth County Latham Elementary School Precinct is not within District 12 but is contiguous to that district. The precinct is 19.82% African-American in total population and 17.41% African-Americanin voting age population. Democrats comprise 65.25% of the registered voters. Within this precinct, the Democratic candidate Gantt received 54.85% of the vote in the 1990 senatorial contest, the Democratic candidate Rand received 53.86% of the vote in the 1988 Lt. Governor race, and the Democratic candidate Lewis took 55.87% of the vote in the 1988 Lewis/Smith Court of Appeals race.

60. Mecklenburg County Precinct 10 is not within District 12 but is contiguous to that district. The precinct is 6.9% African-American in total population and 5.42% African-American in voting age population. Democrats comprise 63.45% of the registered voters. Within this precinct, the Democratic candidate Gantt received 73.01% of the vote in the 1990 senatorial contest, the Democratic candidate Rand received 62.66% of the

vote in the 1988 Lt. Governor contest, and Democratic candidate Lewis received 55.78% of the vote in the 1988 Lewis/Smith Court of Appeals contest.

61. Mecklenburg County precinct 21 is not within District 12 but is contiguous to that district. The precinct is 10.51% African-American in total population and 7.84% in voting age population. Democrats comprise 59.45% of the registered voters. Within this precinct, the Democratic candidate Gantt received 60.11 of the vote in the 1990 senatorial contest, the Democratic candidate Rand received 52.32% of the vote in the 1988 Lt. Governor race, and the Democratic candidate Lewis took 48.30% of the vote in the 1988 Lewis/Smith Court of Appeals race.

62. The eastern and western portion of Congressional District 9 are linked by an area along the South Carolina border which constitutes the southern portion of Mecklenburg Precinct 77.

63. Mecklenburg Precinct 77 is split in the 1997 Congressional District plan between District 9 and District12.

* * *

74. Congressman Watt, an African-American, was re-elected in District 12 under the 1998 plan with 56% of the vote, with 82,305 votes to 42% for Republican "Scott" Keadle, a white candidate, with 62,070 votes,

with others, of unknown races, receiving 2% of the vote, with 2,713 votes.

75. Congressman Watt (Charlotte, NC) won the 1998 Democratic primary in District 12 under the 1998 plan with 84% of the vote, with 12,160 votes to 16% for Ronnie Adcock (China Grove, NC), a white Democrat, with 2,275 votes.

[This page intentionally left blank.]

OPENING STATEMENT OF TIARE B. SMILEY (EXCERPTS)

[*30] Ms. Smiley: In District 12 we contend that race did not predominate, that race was drawn for pure partisan reasons, as the Supreme Court said the State may do. We're not arguing that's a compelling state interest. We think the Supreme Court told us in *Shaw* you cannot draw a Section 2 district, therefore we're not arguing compelling **[*31]** state interest.

Our defense to District 12 is entirely separate. It's purely a factual matter and a matter a state is required to draw. I'm sorry if I didn't make it clear. That's entirely separate and the two parts of the state do end up being analytically just very different, but we're not attempting to say those are compelling.

With District 1, we don't believe you have to reach compelling state interest. That's merely race consciousness. Acceptance of race is important in this State. If you reach strict scrutiny, we believe we can establish that there is a compact district. The State drew that compact district. The other *Gingles* being conceded and we believe tailoring has been achieved. I'm sorry if I did speak too quickly. We're used to thinking about these questions. I probably rushed over that point.

Judge Thornburg: Call your first witness then.

Mr. Everett: Can I ask for clarification in connection with the last colloquey? As I understand it from the tenor of the opening statement, if we prove predominate racial purpose as to the 12th District, there's no contention there will be a restriction. I think the Supreme Court, in its opinion noting the matter had not been litigated before, I presume that was not subject -- there was no contention by the State as to

[*32] compelling government issue for the 12th District if it were predominately race based. I would like to clarify that. Obviously that will affect what we need to prove.

Ms. Smiley: The State has no reason to relitigate *Shaw*. We don't contend no compelling motive. We don't believe the State was required the same basis, strong basis in evidence to believe what had to draw a district in that area. There may be issues of racial affairs necessary, and other matters. Race is important in that North Carolina, the Democrats in that area, are African American. We are not contending we have a Voting Rights Act compelling state interest as a defense in that area.

HAMILTON HORTON TRIAL TESTIMONY (EXCERPTS)

[*32] A. My name is Hamilton Horton. I reside in Winston-Salem.

Judge Thornburg: You will have to turn up the mike. Let's try it again.

The Witness: My name is Hamilton Horton. I reside in Winston-Salem.

[*33] Q. What business or profession are you in?

A. I'm a lawyer.

* * *

[*34] Q. And have you had occasion to serve in the North Carolina General Assembly?

A Yes, sir.

Q. And if so, during what period or periods of time did you serve?

A. Let's see. I was elected in 1969 and served in the House in '71, in the Senate in '73, '73 in the Senate and again elected in 1994 to the Senate and reelected in '96, I guess it would be, and am still there.

Q. So you are currently a senator?

A. Yes, sir.

* * *

[*35] Q. In the course of your service in 1997, to what extent [*36] were you able to follow the development of a Senate Redistricting Plan?

A. Actually, very little. That was sort of handled by a couple of people of the other party who did most of the work. Seemed to me in camera. In any event, there was no involvement on my part or anyone else I knew on the Republican side.

Q. How many senators are there in the North Carolina Senate?

A. 50.

Q. So what extent then were most senators in the Senate during 1997 involved in the formulation of the 1997 Plan?

A. Several on our side of the aisle. It was very, very little, if any. I don't know but I would suspect a fairly liberal amount on the other side.

* * *

[*36] Q. In the course of your service as senator and running for office, have you become familiar with the different precinct in Forsyth County?

A. To some extent, yes, sir.

Q. Have you become familiar with their racial composition?

A. Yes, sir, pretty much.

[*37] Q. Have you become familiar with the political performance of the precinct there in Forsyth County?

A. Yes.

Mr. Everett: Your Honors, at this time we would like to use and examine him with what is Exhibit 108. My understanding is the one in the book before you that you all have is slightly different in coloration and what we will use is

the map that was used at the hearing in Morganton back in 1998.

Judge Thornburg: That's Plaintiff's Exhibit 108?

Mr. Everett: Yes, sir, I believe that's correct, Your Honor. That's a Joint Exhibit 108.

Q. Now, I'm going to show you a map. Can you see this?

A. Yes, sir.

Q. Ask you what that represents, if you know?

A. Apparently it is a map of Forsyth County, principally the center section would be the map of Winston-Salem.

Q. Let me ask you this: in Forsyth County, are African Americans the residences clustered or concentrated or are they dispersed throughout the county?

A. They are not dispersed evenly. There are pockets here and there -- but the main population center lies in the eastern part of Winston-Salem. Generally if you take the dividing line of the Cherry Marshall Expressway and [*38] University Parkway and everything to the east of that would tend to be heavy concentration of black and to the west would be a concentration of white population.

Q. So that in Winston-Salem itself they are concentrated in this particular area?

A. That's correct.

Q. Does the area shown in the red portion of the map tend to conform, to your knowledge, of the precinct that are majority black or substantially black residents or population?

A. I really can't see it that well from here. May I step down?

Judge Voorhees: You may.

(Witness leaves the witness stand).

Q. If you have a magnifying glass?

A. This does not have the street names on it, so it's very difficult to be precise, but this does clearly delineate the eastern and western portions of Winston-Salem.

Q. And --

A. I gather from this that this would be the heavy black population, as I've testified.

Q. This is listed as being 40 to a 100 percent black and insofar as Winston-Salem is concerned, is there any of those red 40 to 100 percent black precinct, which is not **[*39]** included in the 12th District?

A. I gather the blue line -- yes, sir, there is this one up here at the extreme northwest which appears to be outside of it and that appears to be the only one. This portion doesn't have a number on it, but looks like 61.65 percent.

Mr. Stein: Your Honor, we have stipulated that this exhibit is authentic, that it accurately represents what it purports to represent and suggest that this witness is simply going up and reading from Mr. Everett's exhibit and not testifying from personal knowledge. And this is a joint exhibit.

Judge Thornburg: We will let Senator Horton testify, of course, because he is knowledgeable, but it would expedite matters if you ask is this an accurate representation.

Mr. Stein: We have agreed to that.

By Mr. Everett:

Q. Anything you know about the one precinct that's outside of the district?

A. The one that is outside of the district.

(Witness returns to the witness stand).

That is not a heavy populated section of town. It's an extension of -- I believe, again, I can be corrected because the names of the streets aren't on the map, but **[*40]** it's my belief it's Palestine Avenue out there, which is a line of trailers, for several miles woods, are some streets back in there, small, very nice houses, I would say on about half acre lots. But in general that big box are stores and parking lots seem to dominate that area. It's not heavily populated, I guess is what I'm trying to say.

Q. Senator, let me ask you this. During the 1997 period -- while the '97 Redistricting Plan was being considered, did you have occasion to discuss the plan and its formulation with members of the General Assembly?

A. Just in passing, but not in any official capacity.

Q. Did you discuss it with both members of the House and Senate?

A. Oh, yes.

Q. Let me ask you this then: from your observation of this map and your knowledge of the precinct in Forsyth County that are included in the 12th District, can you state whether you formed an opinion as to the predominate motive of the General Assembly for drawing the boundaries of the 12th District in Forsyth County as drawn?

Mr. Stein: Objection, Your Honor. This witness is not here as expert witness. The issue before the Court is based on all the evidence that's presented. Whether the plaintiffs, in fact, prove their case. Everybody in **[*41]** North Carolina can express an opinion, but it's for the Court to decide it based on the evidence. He isn't offered as an expert witness. It is not the

function of one legislator to ascribe motives to the rest of the General Assembly.

Mr. Everett: May I respond, Your Honor?

Judge Thornburg: The objection is overruled. Let's move along.

By Mr. Everett:

Q. Please answer it. Do you have an opinion?

A. I do.

Q. What's that opinion?

A. Seems to me, in my opinion, is that it was an attempt to put the black population of Winston-Salem in the 12th District.

Q. And with respect to predominate motive, is it your opinion that was a predominate motive?

A. Yes, sir.

Q. Now, with respect to the 1998 plan, was there any changes in the grouping of the precinct in Winston-Salem as to African American, heavy African American percentage or did that remain the same --

Mr. Stein: Objection as to relevance.

Judge Thornburg: Overruled.

A. I'm afraid you will have to show me the map to be **[*42]** able to tell you that.

Q. From the map of Forsyth County that I've shown you and the map of the 12th District as a whole, which is under here, I'd like to ask you and also your discussions prior to the enactment of the plan: Did you form an opinion as to the motives of the General Assembly for drawing the boundaries of the 12th District as it was drawn?

Mr. Stein: Objection.

Judge Thornburg: Overruled.

A. I can speak insofar as the concentration of the population from personal experience only with respect to Forsyth County. And I do know that the portions in the12th District were those that are most exclusively black.

Q. Thank you, Senator.

* * *

[*42] Q. Senator Horton, I think you've told us that you weren't on the Redistricting Committee?

A. That's right.

Q. You didn't participate with those who were drawing the plan?

A. No.

Q. And you say there was principally Democrats in the **[*43]** Senate working on the plan?

A. That's right.

Q. In the House, on the other hand, there was a Republican majority in the House and a Republican Chair of the Redistricting Committee over there?

A. I believe that's right.

Q. Did you confer with RepresentativeMcMahan who was the Chair in the House of the Redistricting Committee about the plan?

A. No, sir.

Q. Did you speak at any public hearings about the plan?

A. No, I did not.

Q. Speak on the floor of the Senate about the plans before the Senate?

A. I don't recall. I very well may have, but I can't tell you yes or no.

* * *

[*45] Q. Isn't it true in Forsythe County there are precincts where the voting day results show higher in some elections, higher votes for Republicans than the Republicans registration?

A. Yes, sir.

Q. But there are precincts with majority of Democratic registration where Republicans sometimes prevail?

A. I think that's true all over the State.

STEVEN RAY WOOD TRIAL TESTIMONY (EXCERPTS)

[*48] Mr. Everett: We call -- Your Honor, the plaintiff calls Steve Wood.

Steven Ray Wood, being first affirmed, testified as follows during *Direct Examination*:

By Mr. Everett:

Q. Please state your name and residence.

A. Steven Ray Wood, 1221 North Main Street in High Point.

Q. How long have you resided in High Point?

A. Since 1978.

Q. That's in Guilford County?

A. Yes, sir, that's correct.

Q. What business or occupation are you in?

A. I'm a minister and educator and also a singer and song writer.

Q. What sort of education do you have for your particular business?

A. I'm a college graduate. Graduated from John Wesley College there in High Point. Also graduate of Edgeburg College, Masters Degree in History at the University of North Carolina Greensboro. Masters of Divinity Degree of Houston, Graduate School of Theology, Houston, Texas, and Doctorate at Lutheran Center.

Q. Have you ever served in the General Assembly of North [*49] Carolina and, if so, at what time?

A. Yes, sir. I served one term in the 1985 session, was involuntarily -- did not serve that next term, but came back in

1988 and served in the House since that time. And then my seventh term now.

Q. During your service in the General Assembly from what district were you elected, what county or cities are in that district?

A. Initially I was elected from House District 28, which was comprised exclusively of some two member district precincts in Guilford County. Since 1992, I served in House District 27, which includes parts of Guilford and parts of Davidson County.

Q. What's your political party?

A. Republican.

Q. Now, in the 1997 House of Representatives for the General Assembly, state whether you held any office or position and, if so, what that was?

A. In 1997 session?

Q. Right.

A. Yes. I was a member of the House and also served as Speaker Pro Tem of the House that session.

Q. State whether or not you had any committee memberships.

A. As Speaker Pro Tem under the House rules I served as **[*50]** a member of each committee of the House.

Q. While serving the General Assembly in 1997 and '98, please state whether or not you followed closely the development of one or more of the congressional redistricting plans.

A. Well, I followed it as closely as I could. As you know, the general public and most folks who followed that, became a

little confusing after awhile with all the plans, but I did try to follow it closely. Yes.

Q. Did you have any individual reasons somewhat unique to you for following the development of the congressional redistricting plan?

A. Well, I did. I had interest in possibly running for Congress in one of those, depending on how the redistricting took place, so I had some interest from that standpoint certainly.

Q. And did you, in fact, at a later time run for Congress?

A. Yes, I did.

Q. Now, before the General Assembly enacted a redistricting plan at the end of March 1997 to replace the 1992 Plan that the Supreme Court declared unconstitutional, did you hear a debate and discussion about the plan on the floor of the House of Representatives and among the members of the General **[*51]** Assembly?

A. Yes, I did.

Q. And did you participate in the discussions in that regard before the 1997 Plan? You talked to others as to the plan?

A. Yes.

Q. Now, let me ask you this: in the course of your service in the General Assembly, and in campaigning for election to the General Assembly, have you become familiar with the precincts in Guilford County?

A. Yes, I have a good general knowledge of the nature of precincts in Guilford County.

Q. As part of the process of becoming familiar with different precincts in Guilford County, did you become familiar with their racial composition?

A. Yes.

Q. And did you become familiar with the political registration and political performance of different precincts in Guilford County?

A. Yes, in a general sense, as far as specific statistics per precinct and that sort of thing. I could not recite those, but in terms of general knowledge and performance, voter registration, yes, sir.

* * *

[*55] Q. Mr. Wood, from looking at the map and your general knowledge in High Point there, there's a concentration of African Americans and in Greensboro there's a concentration and otherwise the population of Guilford [*56] County is mostly white?

A. Yes. In general terms, I think that's correct. Those two areas on the map though represent the heavy concentration of the African American voters in Guilford County, that's correct.

Q. Now, for the map and your personal observations and knowledge of the precincts and the population there in Guilford County, could you state whether you formed an opinion as to the predominate voters of the General Assembly for drawing the boundaries that were drawn in the 12th District?

Ms. Harrell: Objection.

A. Repeat the question.

Q. Absolutely. I asked whether from the map from your personal observation and your knowledge of the precincts there in Guilford County, could you state whether you formed an opinion as to the predominant motive of the General Assembly

for drawing the boundaries of the 12th District in Guilford County as they were drawn?

A. In Guilford County, yes, I have.

Q. What is that opinion?

A. Well, my opinion is that --

Judge Voorhees: Wait just a minute.

Mr. Everett: Your Honor, my colleague says on your maps there is a red line over on that side.

[*57] Judge Voorhees: Repose that question.

By Mr. Everett:

Q. Okay. From the map, from your personal observations and your knowledge of the precincts there in Guilford County, could you state whether you have formed an opinion as to the predominant motive of the General Assembly for drawing the boundaries of the 12th District in Guilford County as they were drawn?

Ms. Harrell: Renew our objection for the record.

Judge Thornburg: Overruled.

A. Yes, I have formed an opinion.

Q. What is that opinion?

A. My opinion is that they were included in the 12th District to encompass certain of those clusters; those two clusters of votes in the High Point area and the Greensboro area to include those in the 12th District.

Q. Was it your opinion then the predominate motive was racial?

A. Yes, it is.

Q. In the 1997 Plan, there were five other counties in addition to Guilford County, and I ask you whether you are

familiar with those other counties and the way they were divided in the 1997 Plan?

A. I'm familiar with them, obviously not as familiar as **[*58]** I am with Guilford County, but somewhat familiar with those other counties.

Q. Were those -- did you at some point run for the Congress?

A. I did.

Q. And in what district did you run and when?

A. I ran in the 12th District in the Republican primary in the 12th District in 1998.

Q. And did the 12th District, as that's constituted, consist of the five other counties besides Guilford County that were included in the 1997 Plan?

A. Yes, as I recall that's correct.

Q. So Forsyth, Davidson, Rowan, Mecklenburg -- and Mecklenburg, Iredell, Rowan, Davidson, Forsyth, they were included?

A. That's correct.

Q. Now, with respect to the 1997 Plan, and the dispersion or the allocation of the precincts, could you state whether you formed an opinion, from your observations of the precincts and these other five counties from the map and from the discussions that preceded the drawing of the enactment of the 1997 Plan, did you form an opinion as to the predominate motive for the division of the other five counties as they were drawn in the 1997 Plan?

[*59] A. Yes, I did form an opinion.

Ms. Harrell: Objection. Could we have a standing objection to the testimony about opinions as to the predominate

motive and grounds? It is opinion without adequate foundation.

Judge Thornburg: I'm not offended by your making it. You just go ahead. That's no problem.

Ms. Harrell: Whichever way the Court prefers.

Judge Thornburg: Just go right ahead.

By Mr. Everett:

Q. What was that opinion?

A. My opinion is that it was drawn to maximize to the fullest extent possible and include as many of those African American votes in those counties as possible.

Q. Is it your opinion that was a predominate move?

A. Yes.

Ms. Harrell: Objection.

Judge Thornburg: Overruled.

Q. Now, why did you run for Congress in the 12th District when you are no longer a resident of that district?

A. Well, in the original -- I say the original 12th District, as constituted in the '98 Plan, prior to that time it included some portions of my House District so it gave me a basis upon which to consider running for that **[*60]** House -- that congressional seat at that time.

Q. Did you have occasion while you were serving there Pro Tem in 1997 to hear discussions about the First District in the northeastern part of the State?

Ms. Harrell: Objection, hearsay, unless there's some particular identification as to what kind of discussion and its relevance.

Mr. Everett: Let me rephrase that then.

By Mr. Everett:

Q. Do you recall whether in connection with the drawing of the First District there was discussion in the General Assembly concerning preclearance and approval by the Department of Justice?

Ms. Harrell: Objection, hearsay, no foundation, relevance.

Judge Thornburg: Go ahead. Overruled.

A. Well, yes, I do recall that in general that the feeling was that --

Judge Thornburg: Well, sustained. Sustained.

By Mr. Everett:

Q. From your campaigning and your participation in the electoral process, have you formed an opinion to the extent to which African American voters in Guilford County voted for Democratic candidates versus Republican candidates?

[*61] A. Yes, I have formed an opinion.

Q. What is that opinion?

A. My opinion is that overwhelming, predominately the votes are for Democratic candidates as opposed to Republican candidates.

Q. Have you formed an opinion as to the extent to which the percentage of registered African American voters who vote for Democratic candidate increases if the candidate is an African American?

A. I have an opinion and it is yes, that's true.

Q. What is your opinion?

A. It is my opinion that they vote predominately for Democratic candidates.

Q. Now, from your campaigning and your participation in the electoral process, have you formed an opinion to the extent

to which, in North Carolina State, African Americans who are voting vote for Democratic candidates against Republican candidates?

A. I have.

Q. What is that opinion?

A. Is that they vote overwhelmingly in favor of Democratic candidates based upon my observation of the voting performance.

Q. Could you state whether you have an opinion as to whether the percentage of registered African Americans who [*62] vote for Democratic candidate increases if the Democratic candidate is African American?

A. It is my opinion, from my own research and observation, the trend is they vote, the turn-out is heavier and stronger.

* * *

[*62] Q. Representative Wood, I have a few questions for you. I believe you said you were Speaker Pro Tem in 1997; is that right?

A. In the '97, '98 session, that's correct.

Q. Okay. And you are a Republican yourself; is that right?

A. That's correct.

Q. And do you recall what the division between Republicans and Democrats in the House was in 1997?

A. Are you referring to the North Carolina House itself, of 121 members in the North Carolina House?

Q. Right.

A. Yes, I do.

Q. What was that division?

A. There were 61 Republicans and 59 Democrats, as I recall.

Q. Okay. And isn't it true that you were elected Pro [*63] Tem with a vote of 58 Democrats and only 3 Republicans?

A. That is true.

Q. And isn't it also true that after that you were excluded from the Republican caucus?

A. That is not true relative to the 1997, '98 session, no.

Q. It is not true?

A. No.

Q. And isn't it true that as Speaker Pro Tem you were not assigned to preside over the House and rule the gavel, so forth, by the Speaker at any time that session?

A. That is true.

Q. And when you ran for Congress in 1998, do you recall how many Republican candidates there were in the primary?

A. There were a whole lot, it seems to me, five or six. I think, more specifically, I think five or six at least.

Q. And is it consistent with your memory out of six Republican candidates you came in fifth?

A. That's correct.

Q. And that is it also true that you received 800 votes out of more than 12,000?

A. I think that's correct, around 7 percent. I didn't do well as I hoped to.

Q. So there were other candidates in the primary who were selected by most of the voters that voted in the [*64] primary and you were not one of them; is that right?

A. Well, I finished fifth in the primary elections, that's correct.

Q. Now, as Speaker Pro Tem, officially you were an exficio member of all House committees at that time; is that right?

A. That's right.

Q. And if the minutes that are in the record as stipulated exhibits show that there were four House committee meetings in 1997 involving redistricting and that you only attended one of them, would that be true? Do you deny that?

A. I don't recall if I attended all of the meetings. That may be correct.

Q. Okay. And you didn't speak at that meeting either, did you or do you recall?

A. I don't recall if I spoke at the specific meeting to which you refer about.

Q. You wouldn't dispute the minutes on that basis, would you?

A. Not from what I recall at this moment, no.

* * *

[*64] Q. Well, then 58 out of what, 59 Democrats voted for you [*65] to be the Speaker Pro Tem?

A. That's correct.

Q. So you had a good relationship with the Democrats?

A. I would like to think so, yes, sir.

Q. You knew pretty well why they were doing things such as redistricting, didn't you?

A. Yes, sir, I did.

Q. And is your testimony, as to the predominate motive, take that into account what you picked up from Republicans and Democrats?

Ms. Harrell: Objection.

Judge Thornburg: Overruled.

A. Yes.

Q. When you ran, you ran under the '98 Plan?

A. That's correct.

Q. And that was one for which your home county had been cut out?

A. That's correct.

Q. By the way, if you saw a document that refers to the Greensboro black community, would you be able to identify what that Greensboro black community is?

A. You say if I saw a document if --

Q. Let's see an e-mail which refers to the Greensboro black community being placed in the 12th District or removed from the 12th District?

[*66] A. If you mean in a geographic and demographic context, yes, I think -- yes, I believe I could.

Q. Do you think you could go to Greensboro and find and identify where that Greensboro black community was located?

A. Yes.

JOHN HUGH WEATHERLY TRIAL TESTIMONY (EXCERPTS)

[*66] Mr. Everett: John Weatherly.

John Weatherly, being first duly sworn, testified as follows during *Direct Examination*:

By Mr. Everett:

Q. Mr. Weatherly, I understand you have a slight hearing impairment. I'll try to speak louder so you can hear. I'm under the same boat, so I appreciate you doing the same.

State your name and your residence and how long you resided there.

A. My name is John Hugh Weatherly, reside 142 Quail Hollow Drive, Kings Mountain. I lived at that address for 22 years.

Q. And what business or profession, if any, are you in?

[*67] A. I'm retired. I retired as an industry forester for Bow Water Paper Company after a 35 year career as an industrial forester.

Q. Have you participated in politics in any way, and if so, in what way?

A. When I lived in Catawba County, I was a member of the County Board of Commissioners; in Cleveland County, I served in the General Assembly representing the 48th House District for eight years for the years '89, '90 and '93 through '98.

Q. And in the course of your service in the General Assembly, could you state whether or not you had occasion to serve on any commission or study group concerned with the electoral process in North Carolina?

A. I was a member of the Election Law Reform Study Commission and the House Election Laws Committee.

Q. In that capacity, did you develop a special interest in redistricting process in North Carolina?

A. I did. I had to sponsor two pieces of legislation so I had more than a passing interest in the currents of the elections.

Q. During what period of time were you serving in that study group and how many people were involved?

A. '96 and '97.

Q. So that was about the time the '97 Redistricting Plan [*68] was being prepared?

A. Yes.

Q. What is your political party, by the way?

A. Republican.

Q. Now, in connection with the -- with your interest in redistricting, did you later have occasion to propose legislation concerning the redistricting process?

A. Related -- I had two pieces. First piece concerned limited voting and appointment of elected positions without standing for election; that's related somewhat. It's a matter concerning Cleveland County in particular. But I also sponsored legislation in 1993 that would, by constitutional referendum, established independent nonpartisan redistricting commission.

Q. So then you are very concerned with the redistricting process?

A. Yes.

* * *

[*70] Q. All right. Now, were you familiar with the discussions of the General Assembly about the formation of the 12th District in 1997?

A. Yes, I was.

Q. And were you familiar with the boundaries generally of the 12th District in Mecklenburg County?

A. Not intimately, but I was aware that they were being redrawn to meet a requirement.

Q. Now, let me ask you this, and this is with respect to the '97 Plan: from your knowledge of the precincts there and the discussions in the General Assembly and otherwise, with respect to the '97 Plan, did you form an opinion as to the predominate motive for the dividing of Mecklenburg County between the 12th and the 9th Districts as it was divided in 1997?

A. Yes. There was overriding being directed to make a district that would be predominately racial.

Q. Was it your -- was it your opinion that the motive for splitting the Mecklenburg County in that way was predominately racial?

Mr. Stein: Objection.

[*71] Judge Thornburg: Overruled. You may answer.

A. Answer?

Q. Yes.

A. Yes, it was. But was it was definitely racial. It had to be to meet the requirement that the new district would be comprised, yes.

Q. Now, with respect to the rest of the 12th District, which is shown here in this larger map, did you become familiar back

in 1997 before the '97 Plan was adopted with the boundaries generally of the 12th District?

A. I observed the changes made and was very much under the impression that the original '92 version had been characterized as being bizarre and this version was somewhat less bizarre, was the general discussion.

Q. With respect to the predominate motive for drawing the 12th District, as just shown here on this map, which is up here, did you form an opinion as to the predominate motive for drawing the 12th District in that manner?

Mr. Stein: Objection.

Judge Thornburg: Overruled.

A. Yes.

Q. What is that opinion?

Mr. Stein: Objection.

Judge Thornburg: Overruled.

A. It was the requirement being met that it would be a [*72] racially gerrymandered district.

Q. In other words, that was the predominate motive for doing so?

A. Yes, sir.

* * *

[* 72] Q. Mr. Weatherly, I may have misunderstood you. I understood you to say that in the '97 Plan that Cleveland County was split between the 9th and the 11th District?

A. It's my recollection at the moment, yes.

Q. Let me -- before we go to that, let me show you what is a joint exhibit. This is the '92 Congressional Plan that the

Supreme Court found unconstitutional. In that plan, it seems to show that the 9th District included Mecklenburg, parts of Mecklenburg, all of Gaston, and parts of Cleveland. Do you recall that?

A. Yes.

Q. Cleveland was both in the 11th and 9th District in the '92 Plan. Do you recall that?

A. Yes.

Q. Now, do you recall which district you were in? Were you in the 9th or the 11th District?

A. The 9th.

Q. Then this other map that shows the 97 House/Senate [*73] Plan A, which is what we're having a lawsuit about here. It shows down at the bottom that Mecklenburg -- that whereas the 9th District had been in three counties, two of which were split, that the 9th District here is, again, part of Mecklenburg?

A. Yes.

Q. All of Gaston, and here all of Cleveland. Do you think this map is wrong?

A. No, I don't. It's just that my recollection, the district had been changed.

Q. Several times?

A. Periodically.

Q. Right.

A. And in the particular two year term might be a little vague in my mind.

Q. But the change, as it relates to the 9th District, was, as before there were three counties, two of which were split in the '97 Plan. Cleveland, your county is whole; Gaston is whole and Mecklenburg is the split county; is that right?

A. Yes, sir.

Q. All right. Now, you weren't on the redistricting -- you had an interest in redistricting but you were not a member of the House Redistricting Committee?

A. I was not.

[*74] Q. That was led by Representative McMahan from Mecklenburg?

A. That's right.

Q. He's a Republican?

A. Yes.

Q. The Republicans had a slim majority in the House and had the chairs of all the committees; is that right?

A. Yes.

Q. Now, did you confer with Representative McMahan about the congressional districts being drawn in 1997?

A. I had conversations with him.

Q. And did you understand, when he was proposing the plan, that was first the plan that his committee had come forward with and then the ultimate plan, this plan that was adopted that as to the 12th District he said that the overriding motive was political, it was to preserve the six, six Democratic Republican split and, in fact, some incumbent protection. Do you recall him taking that position?

A. I'm surprised if he did say that.

Q. Well, did you take the position with him that the plan was wrong because it was race based?

A. I certainly had that opinion that it was race based, but they were under order to make it race based.

Q. Whose order was that that you are talking about?

[*75] A. Well, the Justice Department had by direct order or inference or whatever said that it had to be two minor districts.

Q. Well, but, in fact, the district that was drawn in 1997 in the 12th District was majority white, wasn't it?

A. I think by percentage it might have been.

Q. As opposed to percentage, but by people was it majority white?

A. Yes.

Q. Now, you did attend one of the public hearings that was held in this matter, did you not?

A. I'm sure I must have, if it was held in the Legislative Building particularly.

Q. Do you recall -- do you recall on February 26, 1997, that there was a public hearing in the Legislative Building where the members of the House Committee and the members of the Senate Committee were present and heard from various people, legislators, and people from the general public?

A. Yes.

Q. Do you recall talking at that public hearing?

A. I believe I made a presentation.

Q. Do you recall that you expressed some complaints regarding the -- this district that was being proposed or the two districts that were being proposed, one by the [* 76] House and one by the Senate?

A. I would suspect that I did. I'm a little vague about it at the moment.

Q. Do you recall that the complaint that you made, the criticism that you had of the plan, was because the primary

interest was being incumbency protection and protecting political party position?

A. Yes.

Q. And you said the Senate and the House Redistricting Plans are designed to protect both of those interests?

A. Yes, it was partly to protect the incumbent's interest.

Q. Well, but do you recall whether you said you made any complaint at that time that there was something wrong because it was -- there was some racial motive that was wrong and was predominated?

A. I might not have said that.

Q. Your proposed constitutional amendment did not prevail in the General Assembly, did it?

A. It did not.

Q. And you proposed a constitutional amendment because of the Constitution of North Carolina says it is the General Assembly that has the sovereign power to draw congressional districts?

A. Correct.

[*77] Q. You wanted to change that?

A. Yes.

Q. And that's a matter of political theory some states have changed?

A. About 11 or 12 have a similar plan.

Q. Right. But North Carolina has chosen to keep that power in the General Assembly and with the people, with the legislators the people have elected?

A. Yes. But my plan was to serve the people, not the political parties.

Q. That was the purpose -- that was your belief as to the commission system would be better but your colleagues in the General Assembly did not agree with you?

A. Not sufficient enough to take action.

* * *

[*77] *Redirect Examination*

By Mr. Everett:

Q. In giving your opinion as to the predominate motive, have you taken into consideration the conversations you had with Representative McMahan?

A. State the question?

Q. In giving your opinion earlier as to the predominate motive being racial, did you take into account, among [*78] other things, your conversations with Representative McMahan?

A. I had a conversation with him. He might not have specifically said that, but certainly the impression would have been that's what they were arriving at.

Mr. Stein: Objection. Motion to strike.

Judge Thornburg: Motion to strike allowed.

By Mr. Everett:

Q. In any event, your opinion took into account recollections, contacts in the General Assembly at that time; would that be true?

Mr. Stein: Objection.

Judge Thornburg: Overruled.

A. The prevailing atmosphere and environment was what they were coming up the the racial gerrymandering district --

Mr. Stein: Objection.
Judge Thornburg: Overruled.

[*81] Q. So there's no confusion about it, since we have the same initials, can you explain what relationship, if any, you are to me?
A. Yes, sir, I can. My father and your father were brothers. And before your mother married your father, I came along and my daddy named me for your father. So that's the reason you are not a junior.

* * *

[*82] Q. Now, moving forward to 1997, could you state whether or not your county or city was split in any way?
A. Yes, sir. The county and city both were split [*83] significantly, in my opinion, and very radically to pick up much of the African American community.
Q. Were you familiar with the general dispersion, if any, of African Americans in Rowan County?
A. Yes, sir, to some extent.
Q. State whether or not they tend to be concentrated in any particular locations in the county. And if so, where?
A. Yes, sir, they do. They are basically concentrated in a town we call East Spencer and in the area I refer to as Jersey City. But it's in the White Packing Company area there and in the Livingstone College area.
Q. Now, in connection with this case and after -- well, first, did you become a plaintiff in this case at some point?
A. Yes, sir, I did. In that I had followed your activities in the 1992 case and, in fact, dropped you a line, sent you some

clippings at that point and have followed it generally as you progressed through it. You and I, in a telephone conversation a time or two, had talked about Rowan County and I was glad to serve as a plaintiff on that basis.

Q. Now, as a result of participating in this lawsuit or maybe even before participating, did you have occasion to go to the Board of Elections and try to determine what the breakdown was in Rowan County?

[*84] A. Yes, sir. I wanted to be sure what I was getting into when I became a plaintiff in this case, particularly as far as Rowan County and its division was concerned. I went to the Rowan County Board of Elections and they were kind enough to furnish me a precinct map of both Rowan County and Salisbury. They had a list of precincts there, all the precincts in the county and their designation as far as District 12 and District 6 are concerned.

I obtained maps from them. With their help I colored them in and they are on the table over there as to the portions of the 12th District and their boundaries and the Sixth District and its boundaries.

Q Now, were you deposed in connection with this case several weeks ago?

A. Yes, sir.

Q. And did you present these particular exhibits, these maps you had drawn at that time. Were you asked questions about them?

A. I was asked questions about them, sir. I was somewhat surprised they got into the deposition, but that was fine with me.

Q. All right, sir. Now, with respect to these maps, since there is some question, I think the defendants have objected on grounds of authenticity?

A. Yes, sir.

[*85] Q. These are Deposition Exhibits 60 and 61. Who prepared these?

A. I did.

Q. I'm going to ask you to hold these up and these are Deposition Exhibits 60 and 61. And why don't you hold them up and you can indicate -- take 60 first and indicate what that is.

A. This, Your Honor, is --

Q. Wait a second for the Court to get theirs.

A. Excuse me.

Q. Tell us what 60 is and what it represents and then do the same with 61.

A. 60 is a map of Salisbury area that was divided according to District 12 and District 6. District 12 is in yellow. The East Spencer area I referred to predominately African American is Precinct 18, this is numbered by precinct. The Livingstone College and Jersey City area are represented by Precinct 42 and 35, I believe, if I'm reading this correctly. Those are the concentration of black voters.

Q. By the way, you mentioned Livingstone College?

A. Yes.

Q. I'm going to interrupt you for just a moment. Do you have any particular relationship to Livingstone College?

A. Not now. I have had in the past. I was privileged **[*86]** to receive an honorary doctorate degree from Livingstone College. I worked with the college on a number of occasions,

particularly when I was with the bank. I headed the local -- as Treasurer of the local United Negro College Fund and was an Associate Trustee of Livingstone for a while.

Q. Okay. Continue, I'm sorry.

A. That's all right. The 12th District comes in from the northeast through Spencer, picks up the heart of Salisbury and moves out of the county towards Iredell County.

If I may have the other map.

Q. Number 61?

A. This is 61. The Salisbury map fits in the area here. It was too detailed to go into the full county map of Rowan. So that this represents the county as the yellow portion is District 12. The purple portion here is District 6. They are two split districts, according to our Rowan County Board of Elections and one of those --

Q. You said district. Is it precinct?

A. Misspoke. I apologize. There are two split precincts, one in East Spencer and one in the southwestern side of Salisbury where District 6 encroaches into the precinct themselves, so that this is the northern portion of Rowan County is District 12 designation.

[*87] If you will notice on the map to the right Westward 2 looks as if it's split and the Millford Hills District -- looks as if the East Spencer District 12 and 6 is split and Southward 12 and 6 is split according to the map. And this is the one I obtained from the Rowan County Board of Elections.

Mr. Everett: Your Honors, we'd like to offer these into evidence over the defendants' objection of authenticity. We believe we demonstrated these are authentic.

Judge Thornburg: We'll admit it for illustrative purposes.

Mr. Everett: There's another exhibit, 62.

Judge Voorhees: Did you offer 60 and 61?

Mr. Everett: Yes, sir, Exhibits 60 and 61.

Judge Thornburg: Same ruling.

By Mr. Everett:

Q. I'm going to show you Exhibit 62 now and can you indicate if you know what that is?

A. This is a list of the precincts in Rowan County and, how shall I say, district allocation for congressional district for the Senatorial district and House district, North Carolina Senate and, of course, the North Carolina House. And they show here as well that East Spencer is split between District 12 and District 6 and Southward is **[*88]** split between District 12 and District 6 and that was the purpose of getting that.

Mr. Everett: We would also like to offer that into evidence, Your Honor.

Judge Thornburg: Let it be received.

By Mr. Everett:

Q. Mr. Everett, I'm going to show you Exhibit 106, and this is a map showing racial distribution allocation. Can you state from your knowledge of Rowan County and including what you have done in terms of checking, whether the percentages in terms of racial concentrations, as shown for Rowan County here, corresponds with that which you have observed?

A. The Rowan County has -- had the predominately black areas allocated to the 12th District. East Spencer, East Ward,

I believe it's South Ward, West Ward, those are predominately black and predominately Democratic and vote that way.

Q. All right. Now, let me next ask you whether, from your knowledge of Rowan County and Salisbury and the knowledge of racial concentrations or dispersions in that county, whether you were -- whether you formed an opinion as to the predominate motive of the General Assembly in providing Rowan County as it did in creating the 12th District in the 1997 Plan?

[*89] A. In the 1997 Plan, it's my --

Ms. Harrell: Objection to any opinion that he would express on that subject. The witness has not testified to anything that would allow him to testify to his opinion about the motive of General Assembly.

Judge Thornburg: We'll sustain that objection at this point, Mr. Everett.

By Mr. Everett:

Q. Mr. Everett, in connection with this plan, could you state whether you see any way in which the 12th District in Rowan County corresponds to the racial concentrations that you just identified in Rowan County?

A. Yes, it does. And there's a very classic example in the East Spencer Precinct that was split. It was split near Boundary Street and on the north side is most solidly black and on the south side very few white families live there. So it's evident to me, on its face, that this is racially gerrymandering.

Judge Boyle: You have it African American on both sides of the boundary, the way you testified?

The Witness: I apologize. It's African American on the north side of Boundary Street and south side is predominately white on the East Spencer Precinct.

Judge Boyle: That's the same thing you said a minute ago. I may be misunderstanding. Before you said **[*90]** there were few, if any, whites south, okay.

The Witness: There were a very few whites south of Boundary Street.

Judge Boyle: If it's black on the north and no whites on the south --

The Witness: It's predominately black.

Judge Boyle: -- on both sides. If it's black on the north and there are no whites on the south, then it would -- do you get it?

The Witness: Well, I may be missing something, sir, but in my opinion it went down Boundary Street to eliminate the few whites.

Judge Boyle: Just the way you said it.

The Witness: I apologize. Sorry, your honor.

Judge Boyle: If it's black to the north and no whites to the south, isn't it black to the south also?

The Witness: I apologize, your honor. I may have misspoken. What I'm trying to say is to the north side of Boundary Street is predominately black, to the south side of Boundary street is predominately white. I apologize.

Judge Boyle: Okay.

By Mr. Everett:

Q. Are both of them about equal in terms of concentration of people?

[*91]A. No, sir. The East Spencer Precinct has, I think, about five white families in it on the south side of Boundary Street.

Q. How many African American families?

A. I don't think there are any.

Q. So there are only about five families altogether on the south side?

A. In the entire precinct, yes, sir.

Judge Boyle: Then you were right.

* * *

[*95] Q. All right. With regard to the precinct of Salisbury in the 12th District in the '97 plan, what is the name of your precinct or the number?

A. The name of my precinct?

Q. The name or number it goes by.

A. North Ward 2. I have to look up the number to be sure. It's precinct number 40.

Q. Is that precinct majority white or African American or something else?

A. It's majority white.

Q. And does it also tend to vote Republican?

A. Yes, ma'am.

Q. And it has -- to your memory it has a majority Democratic in registration; is that right?

A. As best I remember, the registration, based on recent political campaigns, has shifted a good bit. My memory tells me, from past history, it's basically been Democratic.

Q. All right. But the voting is no longer Democratic?

A. The voting is Republican. The registration was Democratic.

Q. When you did these maps that you testified about, [*96] when did you visit the Board of Elections to get the information you needed?

A. Ms. Harrell, it was back at the time I agreed to become a plaintiff in this suit. I wanted to be as sure as I could of where I am and what I was participating in as far as the suit is concerned.

Q. And you became a plaintiff in 1997; isn't that correct?

A. Somewhere along in there, yes, ma'am.

Q. And at the time, I believe you didn't volunteer, but your cousin Robinson Everett called you and said he needed a plaintiff, asked you to be a plaintiff?

A. I didn't call him and ask him to let me join. We were in conversation. I agreed to join and was glad to be a part of it, yes, ma'am.

Q. But -- and when you got these maps about that time or when you got the list and map and you called him about that time, so far as your precinct's shown on there, the precincts are as they existed in 1997; is that right?

A. According to the County Board of Elections.

Q. You don't have any information as to how the precinct lines changed since 1990, do you?

A. No, ma'am.

Q. So if any -- whatever it shows as to whether a precinct is split or not may or may not have been true [*97] under the 1990 precincts, so far as you know?

A. As far as I know, the precinct splits are shown on the 1997 Plan and this is furnished by the Rowan County Board of Election.

Q. You have no knowledge as to the same with the 1990?

A. No, ma'am.

Q. With regard to that list that you had of those precincts that showed some splits, did the list also show splits for State House and Senate districts?

A. Yes, ma'am.

Q. And were there, in fact, several splits for State House and Senate districts for some precincts?

A. State House one, Senate district, two splits.

Q. In fact, one of the precincts was split from both the Senate and State House?

A. Yes, ma'am.

J. H. FROELICH TRIAL TESTIMONY (EXCERPTS)

[*101] Q. Please state your name, residence and occupation.

A. J. H. Froelich, Jr., go by Jake. I'm from High Point, North Carolina. I am in the movie production business, the hotel business and recently have been consulting in the businesses that we have just sold, which are furniture market show room properties; also in the furniture business.

Q. And how long have you lived in High Point?

A. All of my life.

Q. Could you state your education?

A. I went to the High Point City schools and then went to Weeberry (phonetic) Forest School in Orange, Virginia; went to the University of North Carolina in Chapel Hill, graduated. Was in the first MBA class in Chapel Hill; got my Master in Business.

Q. Could you state what activities you engaged in in the electoral or political process over the years?

A. I have been involved in the political life of our state and our region for a long time. I have been a precinct -- elected precinct official, county Democratic party chairman. I have ran the campaign for Governor of Hargrove Bowles, Jr. In the '70's. I have been involved **[*102]** in our region and state in political life for most of my career.

Q. Okay. And as a result of that, have you become acquainted with the precincts in your home county of Guilford County?

A. Yes, I know the precincts, some of the make up. I know sometimes I have gone door to door in times past in the '50s. I haven't done that in recent times.

Q. Have you become familiar with precincts in other counties in the Piedmont?

A. I sort of understand how they are organized and what goes on.

Q. Mr. Froehlich, could you state whether or not in 1992 you were first placed in the 12th District?

A. I was in the 12th District because our residence moved slightly before that. We built a triple mixed use property in High Point, which had condominiums on the top three floors, showrooms on the bottom floor, and offices on the middle floor. I moved into what I discovered was that precinct having been in the 6th District all of my previous life.

Q. And then in 1997 were you still in the 12th District?

A. I was. That's the one that was thrown out.

Q. That's right.

A. It was and I'm not anymore. I'm back in the 6th.

[*103] Q. So in the 1997 Plan, which is the one now being litigated, which was never put into effect, you were, in fact, in the 12th District?

A. Yes.

Q. Now, at that time did you -- when you saw the 1997 Plan, did you look carefully at the precincts to see how the district was formed?

A. Yes. And that district was formed by putting predominately black precincts in the High Point portion of that congressional district.

Q. Were you here during Mr. Woods' testimony?

A. Yes, I was.

Q. He's also from High Point?

A. Yes, sir.

Q. You heard him describe the precinct allocation there in Guilford County?

A. Yes, I did.

Q. Was that what you also observed?

A. I observed, yes.

* * *

[*106] Q In terms of the 12th District, could you determine what would be the likelihood, from your knowledge of the political process and electoral process of the 12th District is constituted in 1997 Plan, would elect an African American as a candidate or nominate an African American as a candidate?

A. It would seem highly unlikely, yes, sir.

Q. And what about with respect to the opportunity of a **[*107]** white Democratic candidate in the primary? How would you -- what would be your opinion as to the likelihood of success?

Ms. Harrell: Objection.

Judge Thornburg: Overruled. You may answer.

A. The chance of a white candidate in a primary would be very, very difficult for that person to be nominated.

* * *

Q. Mr. Froehlich, just a couple of questions. With regard to your business background, did you mention you're in television or radio?

A. I have an interest in -- I have had television interest, yes, ma'am. I do currently. I have an interest in the Wilmington TV.

Q. With regard to your participation in television industry, have you been in business with Counsel Robinson Everett for a number of years?

A. Yes, I have.

Q. Does that date back to the '70's, I believe?

A. We had an interest in a venture in Greensboro.

* * *

[*108] Q.One final question: you were asked about a relationship with me. Why did you join this lawsuit; why are you a plaintiff?

A.Because I'm interested in what happens in our State. I have been interested in the political life of our State and I was absolutely very, very disappointed that we ever came to a congressional redistricting plan that was race based.

NEIL CARSON WILLIAMS TRIAL TESTIMONY(EXCERPTS)

[*109] *Neil Williams*, being first duly sworn, testified as follows during *direct examination*:

By Mr. McGee:

Q. Hello, Mr. Williams. State your name full for the Court.

A. Neil Carson Williams.

Q. And where do you currently reside?

A. 1912 Shoreham Drive, Charlotte.

Q. And approximately how long have you lived in Mecklenburg County?

A. 30 years.

Q. What is your occupation?

A. I'm an attorney.

Q. And what firm do you work with?

A. Horack, Talley, Pharr & Lowndes.

[*110] Q. As part of your practice, have you had any experience in voting rights cases?

A. A limited amount, yes.

Q. Okay. What is your political party?

A. Republican.

Q. And do you regularly follow the political process in Mecklenburg County?

A. Yes, I try to.

Q. And throughout the state as well?

A. To some extent, lesser extent, but yes.

Q. What elective offices have you held in the past?

A. I was elected to the Charlotte City Council, Council in 1973 and reelected in 1975.

Q. Have you ever run for Congress?

A. Yes, I was a candidate for Congress in the 9th Congressional District in 1994.

Q. And as a result of your involvement in the political process and also considered in being a candidate in '94, are you familiar with the precincts in Mecklenburg County?

A. Yes.

Q. Are you generally familiar with other precincts in the Piedmont area that follow along within the 12th District?

A. To a lesser extent, yes. More so the 12th District as we voted in the last time in 1998.

[*111] Q. Are you generally familiar with District 12 as it was constituted in 1992, the district that ran from Gastonia up through Durham?

A. Yes, that's the way I described it, Durham, Greensboro, Winston-Salem, Charlotte, Gastonia district.

Q. With regard to the District 12, the 1997 Plan the Greensboro, Winston-Salem, Charlotte plan, are you generally familiar with that plan?

A. Generally.

Mr. McGee: If I may approach and use a map.

Q. Showing you Exhibit 106. Are you familiar with this particular map? With the Court's permission, if you'd like to step down to examine it closer.

(Witness leaves the witness stand.)

A. All right.

Q. This is -- I show a map that shows the 1997 Plan as you refer to it in the Mecklenburg, Guilford --

(Witness returns to the witness stand.)

Winston-Salem district. To what extent did the allocation of precincts in District 12 within Mecklenburg County correspond with the concentrations of minor persons in those precincts?

Mr. Stein: Objection.

Judge Thornburg: Ask that again.

Q. To what degree did the inclusion of precincts in [*112] Mecklenburg County districts precincts included in District 12 correspond with the racial breakdown in the precincts?

Mr. Stein: Objection.

Judge Thornburg: Overruled.

A. All of the predominately black precincts were included in the 12th District.

Q. As it was configured in '97?

A. Yes.

Q. In Mecklenburg County, what two Congressional Districts are included in the 1997 Plan?

A. Part of the county is in the 9th District and part is in the 12th District.

Q. And have you formed an opinion as to whether the county was divided along racial lines when those districts were configured?

Mr. Stein: Objection.

Judge Thornburg: Overruled.

A. Yes.

Q. And what is that opinion?

A. That --

Mr. Stein: Objection.

A. That it was so divided with the intent to elect --

Mr. Stein: Objection.

Judge Thornburg: Sustained as to intent. I'll [*113] let him testify as to just what he said, that it's racially divided.

Q. Divided such that the majority minor precincts placed in the 12th District and white predominately white placed in the 9th District?

Mr. Stein: Objection to leading.

Judge Thornburg: Overruled.

Q. In what way, if any, is the western part linked to the eastern part in Mecklenburg County?

A. There's a slight land bridge at the southern part of the county.

Q. Based on your observation of the precincts and as well as your participation in the political process, do you have an opinion, based on the circumstantial evidence from the shape and demographics of the district, if race was a predominate motive in the creation of District 12 in Mecklenburg County?

Mr. Stein: Objection.

Judge Thornburg: Sustained.

Q. Are you aware that the defendants have claimed in this case that District 12 in the 1997 Plan is a Democratic island in a Republican city?

A. I heard that yesterday.

Q. What is your opinion, if any, as to the accuracy of that claim?

[*114] A. I don't think that's correct.

Q. In your opinion, is it possible to draw a Democratic district both in terms of registration and performance in the same general area of the state that encompasses District 12 that is less bizarrely shaped?

Mr. Stein: Objection.

Judge Thornburg: State that question again.

Q. In your opinion, is it possible to draw a Democratic district in the same general area of the state that is less bizarrely shaped than District 12 in the 1997 Plan?

Mr. Stein: Objection.

Judge Thornburg: Sustained.

Q. Let me ask you, then: why do you not think that -- why do you disagree that it's a Democratic island in a Republican city?

A. Because there are precincts nearby that are also Democratic leaning precincts and, as a matter of fact, my understanding is some of those precincts were included in the successor plan to the one we're talking about today. That plan I call the Winston-Salem Charlotte plan.

Q. Which would be, I think, the '98 Plan?

A. '98 Plan, the one we just voted under last Congressional election.

* * *

[*116] *Cross-Examination*

By Mr. Stein:

Q. Mr. Williams, I'm on the Board. Here is a map that shows the 1997 Plan that was under litigation showing the 12th district in yellow and the 9th District in green. You've seen that?

A. Yes.

Q. And the 9th District in this plan has two whole counties, Cleveland and Gaston, that run along the southern border of North Carolina and part of Mecklenburg County; is that right?

A. That's right.

Q. When you ran in 1994 you were running in the Republican Primary against an incumbent; were you not?

A. No.

Q. That was the time when Representative Myrick was first elected?

A. That's right.

Q. And at that time, what were the counties that were included in the 9th District?

A. Mecklenburg looked very much the same, but there was only -- that county looks the same. Most of Gaston County was also in the 9th District and a little portion of Cleveland County.

[*117]Q. Let me show you the map that we have been using here showing the 1992 Congressional Plan. It shows all of Gaston; does it not?

A. That would be wrong.

Q. Because it goes into Gastonia, so that there was a portion of three counties in the 9th district at that time?

A. That's right.

Q. And then the map drawers determined for the 1997 Plan to have two whole counties and parts of Mecklenburg; is that right?

A. That's right.

Q. If they made a decision to include all of Cleveland and all of Gaston, that would then, for the 9th district, would determine how much of Mecklenburg, how many people in Mecklenburg would be in the 12th. First of all, you'd have to determine how many people you would need to get out of Mecklenburg to make a complete congressional district with a

district that included all of Gaston and all of Cleveland; isn't that right, for one-person, one-vote purposes?

A. I'm not quite following you.

Judge Boyle: He means the last particular figure is Mecklenburg County. The constant figure would be Gaston and Cleveland. If you decided on those two, the **[*118]** only choice you have is to make up the difference from the one you are making to make elastic or expandable. You follow me?

The Witness: If you add voters in Cleveland County?

Judge Boyle: No. If you take two as constant, you have to, by definition, make the third flexible or elastic. We understand.

Mr. Stein: All right, sir.

By Mr. Stein:

Q. So that the choices you then have in Mecklenburg, if that's what happened, would be if you are choosing one precinct then you would have to exclude another precinct or precincts. It's kind of like the way they have the budget bill now. You have to pay for what you had. If you are drawing precincts in Mecklenburg, if you are including precincts in Mecklenburg -- I withdraw that, that was the worst question I ever heard.

Isn't it so, that in terms of whether you are making a decision about a particular precinct, if you include that precinct you necessarily then are making a choice between that precinct and another precinct or other precincts?

A. Correct. I don't think Mecklenburg changed very much.

[*119]Q. Well, you will agree that the record is just going by appearances. Does Mecklenburg look any different?

A. Of course not.

* * *

[*121]*Redirect Examination*

By Mr. McGee:

Q. You stated there are 26 minor -- 26 precincts in which African Americans make up the majority in Mecklenburg County; is that correct?

A. Right.

Q. Of those 26, how many are in District 12?

A. All of them.

Mr. McGee: no further questions.

DAN FREY TRIAL TESTIMONY (EXCERPTS)

[*121] Mr. Markham: The plaintiffs call *Dan Frey*.

Dan Frey, being first duly sworn, testified as follows during *direct examination*:

By Mr. Markham:

Q. Mr. Frey, state your name, please.

A. Dan Frey.

Q. And can you tell us who's your employer?

A. My employer is the North Carolina General Assembly.

Q. What's your position?

[*122] A. I work in the information systems division. I work specifically with the computer systems for redistricting and geographic information systems in general.

Q. How long have you held that position?

A. Since August of 1995.

Q. Are you here today pursuant to a subpoena?

A. Yes.

Q. And did you know before that you were going to be testifying today?

A. No.

Q. Let me ask you a few questions. Have you brought along with you some data concerning persons who were moved from various districts in the course of constructing the 199 Congressional District Plan?

A. Yes.

Q. Have you calculated from that data, which is in the province of your department, what is the percentage of African Americans who reside in District 12 in the 1997 Plan who were also included in District 12 in the 1992 Plan?

A. Yeah, as far as -- yeah, that basically for black and white population.

Q. Tell us what that number is for African Americans

A. The number is 232,324.

Q. Can you tell us what percentage that is of those **[*123]** African Americans included in District 12 in the '92 Plan?

A. So based on the 1997 Plan, the people in there, the African American population, 90.2 percent of that African American population was also in the 1992, 12th District.

Q. Can you give us a similar number or the comparable number for what percentage of whites who reside in the District 12 in the 1997 Plan were also included in District 12 in the 1992 Plan?

A. That would be -- yeah, a total of 139,044 people and that's 48.8 percent of the total 1997 District 12 white population.

* * *

[*139] *Cross-Examination*

By Ms. Smiley:

Q. Mr. Frey, I thought you were going to be called only about one issue. I'm happy to have you there to talk about maps.

You were asked about percentage of African Americans moved in who were not moved out of the 199 -- not moved out of District 12 in 1997, as I recall. You gave a percentage. Do you know the memory -- or can I refresh **[*140]** your memory what the formula being used to create that percentage is?

A. Might I draw an illustration to explain?

Q. Yeah.

A. Explain how that is.

Q. Yes.

A. Is there something I can use to draw?

(Witness leaves the witness stand.)

There's been some confusion over this because it's a little bit confusing the way it can be worded, but I was just drawing this up earlier, my understanding of it.

Q. While you are drawing this, tell the Court whether or not this is your formula.

A. Yeah, it's my formula.

Q. Okay.

A. Okay. So this would illustrate the difference in black population between the '92, 12th District and the '97, 12th District. Since the percentage of African Americans was a lot higher in the 1992 Plan, the total numbers were higher. It was 312,791 and then the total in 1992 was 257,

Judge Boyle: '97 you mean?

A. Or '97, excuse me. 257,644. And the question that came up --

Q. Who raised this question?

[*141] A. Marty McGee.

Q. Who's plaintiffs' counsel?

A. Yes. Was how this population had moved -- sort of what percentage of the population had stayed in the same -- remained in the 12th District and what percentage of the population had moved when the new -- when the '97, 12th was drawn. So, basically, we had 232,324 African Americans that were in the '92, 12th that remained in the '97, 12th. So if you

look at it from the perspective of the 1992 Plan, that's 74.3 percent of the African American population that was in the 1992 Plan also was in the '97 Plan. But if you look at it the other way, you can say that, you know, still you have the same number, 232,324 in the '97 Plan, you can say that 90.2 percent of the African American population in the 97 District 12 was also in the '92 District 12.

Judge Boyle: But it's totally irrelevant. It wouldn't matter if everybody got up and moved and an equal number moved in if you are looking at the racial composition is you don't care who the particular individual is.

The Witness: Yeah. And I don't know that was the question.

Judge Boyle: What was the point of that analysis?

[*142] Ms. Smiley: I believe it's still my cross.

Judge Voorhees: The Court asked a question. If you have an answer, go ahead.

Mr. Markham: I believe it illustrates the main substance of a racial core in the creation of a new district 90 percent of the black persons in the '97 district were also there in '92. Only 49 percent of white persons who were in the district remained there. I think it indicates a racial motive in the sense of maintaining the core. That's the purpose we offer it.

DR. RONALD E. WEBER TRIAL TESTIMONY (EXCERPTS)

[*143] Mr. Markham: Our next witness is Dr. Ron Weber.

Ronald E. Weber, being first duly sworn, testified as follows during *Direct Examination*:

By Mr. Markham:

[*144] Q. Dr. Weber, state your full name for the record, please.

A. Ronald E. Weber.

Q. And can you identify for us Exhibit 48 in the deposition exhibits?

A. Yes, that's Exhibit A to my declaration, which includes my curriculum vitae.

Q. That's a reasonably current listing of your consulting and writings and other educational data with respect to your service in political science?

A. Yes, sir.

Q. Where do you teach today?

A. Teach at the University of Wisconsin, Milwaukee.

Q. What subject?

A. Political science, particularly state politics, political behavior and methodology.

Q. In the course of your -- over the last several years, have you had an opportunity to evaluate a number of redistricting plans in the context of *Shaw* lawsuits?

A. Yes, sir.

Q. And can you tell us in which cases you have offered opinions and done analysis with respect to issues regarding whether a significant number of persons were placed inside or outside of the district on the basis of race?

[*145] A. Yes, sir. I was an expert in *Hayes versus State of Louisiana* in Louisiana, of course. In *Vera versus Richards* in Texas. *Miller versus Johnson* in Georgia. Expert by deposition here in North Carolina in *Shaw versus Hunt*. Expert in legislative case in Texas, *Thomas versus Bush*. Expert in *Johnson versus Mortimer*, District of Florida challenging the Third District. *Moon versus Meadows* in Virginia. *Chen versus City of Houston*, local city counsel case in Houston. I think that enumerates the cases.

Q. In addition to those cases, have you also consulted and given advice as well as testimony regarding Section 2 and Section 5 issues for government's and groups?

A. Government's and groups, yes.

Q. Can you identify Exhibit 49 for us?

A. Yes. Exhibit 49 is an exhibit that I prepared routinely to do with my reports or declarations in which I list all the cases in which I have been deposed or served as a trial expert.

Q. And can you identify for us Exhibit 47?

A. Exhibit 47 is my declaration of September 10, 1999, for this case.

Q. I want to go through with you a number of the tables that are presented in that declaration. The First Table is located at page 13 and 14 with regard to split [*146] counties. Can you tell us what value or assistance that table offers to the Court in evaluating issues that relate to this case?

A. That simply enumerates for the challenged plan each of the counties by district that are split on the basis of population and so what this indicates, for example, is that there are on page 13, there are a total of, I believe, ten counties in the First District that are split. Going all the way through on page 14 a

total of six out of six counties in District 12 are split.

Q. Table Two appears at page 19 of that report. What information does that table provide to assist the Court with issues that relate to this case?

A. This table, Table Two, includes the same information as in Table One, but this time it is arranged by counties. So an array can see for any particular county the racial differences between the portion assigned to one district and to another district.

For example, if we look down the table at Forsyth County, the portion that is assigned to the 5th District is only 11.1 percent African American whereas the apportion assigned to the 12th District is 72.9 percent African American. So clearly states the differences between the racial, the composition of the two districts as the county has been split and that goes throughout the [*147] table, whether it's a split involving the 1st or 12th District or the six counties that are neither involved in the First or 12th District.

Q. I'd like to draw your attention to Defendant's Exhibit 435. -- I'm sorry. I misspoke, 433.

Can you tell us what information that exhibit presents?

A. I understand that Exhibit 433 has been prepared by, I believe, Dr. Peterson for the defendants and it's an attempt to do --.

Ms. Smiley: I object, Your Honor. This is defendant's exhibit and this witness is saying what he thinks it is and what it's attempting to show.

Judge Thornburg: Sustained. I'll let him tell what it shows to him but not what he thinks about Dr. Peterson's work.

Ms. Smiley: Thank you, Your Honor.

By Mr. Markham:

Q. What does this show?

A. This is an exhibit that shows the differences between the Democratic percentage assigned in the split counties based on the four criteria of partisanship offered by the defendants. And what it shows is that the difference between the Democratic proportion of each of the counties splitting, they are split within the 12th District, is **[*148]** less than the racial differences. If you look at the racial differences in my Table Two versus the partisan differences in this Exhibit 433, the racial differences are always greater than the partisan differences.

Q. Now, returning to your report to Table Three on page 24. What information does this table provide?

A. Table Three provides information as to each of the municipalities or census designated places that have been split in the drawing, again, of the 1997 Plan under challenge here. And in Table 3, again list by the jurisdictions within each of the districts. So you have, at the top of the table, you have all the jurisdictions that are split within District 1, numbers 13 total jurisdictions that are split and then it goes all the way through all the districts and concludes with the number of communities that are split in District 12, which numbers, I believe, 13 separate jurisdictions that are split in Table 12 to create, again, not Table 12 but Table Three for District 12. The jurisdictions that are split between District 12 and another district.

Q. Okay. Again, is Table Four at page 27 a different way of presenting these same data?

A. Yes, it is. But it's a way in which you can very easily see the racial differences in the communities that are split to draw the various proposals. For example, if **[*149]** you look at

top of page 28 and in the Greensboro split, the portion that's in District 6 is 10.7 percent African American, but the portion assigned to District 12 is 55.6 percent African American, again, focusing on Forsyth County. Bottom of page 29 there you show 16.1 percent is the African American portion assigned to District Five, but 77.4 percent is the African American portion district assigned to District 12. Again, you can see the racial differences as the communities are being split between the districts.

Q. And is exhibit -- Defendant's Exhibit 434 analogous information with respect to the political division of cities?

A. Yes, it is.

Q. How do those two contrast, Table Four of your report and Exhibit 434 of the defendant's exhibits?

A. Again, in looking at the communities in Table Four, I believe in all but one case the racial differences is greater than the political difference in Exhibit 434.

Q. And have you prepared an exhibit which summarizes this information concerning the political data in the divisions of cities?

A. Yes, I have.

Q. Which exhibit number is that? Is it Exhibit 309? I believe that's the one my information shows.

[*150] A. Yes, it's Exhibit 309.

Q. And can you explain for us what that information indicates?

A. Well, the theory underlying the preparation of this exhibit would be if one were to assume that precincts were going to be randomly assigned within the six counties involving District 12, you might have about 36 percent of all

the precincts would be assigned to District 12 and what it shows is that almost all of the precincts that are over 40 percent African American, I think it's all but three are assigned to District 12, but on the political data nowhere is the number in the same range as is the case with the racial data.

Q. Next I want to turn to your Table Five. I believe it appears after page 32 of the text?

A. Yes, sir.

Q. What does this data show regarding the assignment of precincts in Congressional District 12 in the 1997 Plan?

A. This table has a page or more for each of the counties that are split between the congressional districts, and so it has counties from split with District 12, with District 1 and with six other counties as well. But, for example, if we look at one of the counties that is assigned to District 12 and perhaps say District 5, I'm going to page through to the Forsyth County table, this [*151] should be about, I believe it's the eighth page of the tables.

The way I have organized the tables is to list every precinct in the county and to list for it the total population; the white population, the black population, the total VAP, the white VAP and black VAP and the percentage of each of those figures.

Also, in the very far right-hand corner to indicate the district to which it was assigned in the challenged plan of 1997. What you would expect to see if there's a pattern of racial assignment because the districts -- excuse me, the precincts are ranked from the highest African American percentage in the precinct to the lowest in the precinct, you would find the precincts assigned to District 12 would be at the top of the

table. So as you can see in this particular table, every precinct that is majority African American beginning with the eastern elementary school precincts and working up the table has been assigned to District 12. And then you go down and you find a few other assigned to District 12. But you go to the second page of the table, which has the very light majority precincts in Forsyth County. You notice none of them are assigned to District 12 at all, they are assigned to District 5.

So with this information you can very clearly see a [*152] pattern of assignment at the precinct level which, in my judgment, is a racial assignment that is being made or has been made by the state.

Q. Okay. Let's continue. Your text table, Table Six, appears, I believe, after the text on page 55 at page 56?

A. Yes, sir. Table 6 is a table constructed to examine the proposition proffered by the defendants that what really is involved here is assignment of precinct on the basis of partisanship rather than on the basis of race. So I have a series of tables labeled as Table 6 that array each of the six counties in District 12 as well as a table at the end in which I report all the data for six counties in District 12 in which I array the partisanship measure against the racial measure.

For example, again, if we were to look at the Forsyth County table, which begins on table on page 58, Forsyth County table if you look in the far right-hand column and bottom of each table, of course the precincts that are 70 percent African American and 70 percent Democratic are clearly assigned to the 12th District. So in this case, it's 13 of 13 precincts that have that racial composition and also that Democratic composition.

Then you start reading up the table and you begin to see at what point there's no longer the assignment of precincts to District 12. And if, again, as I suggest in [*153] the text of my report, if the inference is it's party that is driving the assignment pattern rather than race, you would find that even in the precincts that are less than 30 percent African American, you would have assignment of Democratic precincts.

For example, if we look at page 58, look at not the Democratic registration figures because the Democratic registration figures are somewhat inflated, if we look at the 1990 Senate race between Harvey Gantt and Senator Helms, we begin to see at the level of less than 30 percent. There's not a single precinct that is less than 30 percent black, but yet supported Mr. Gantt in that Senate race that are assigned to District 12. So the inference here is that if we were following partisanship, some of those precincts would be assigned and you have much more random person pattern in the table of assignment. You see a clear pattern of assignment on the basis of race rather than party.

If you look at the summary table, which begins on page 68 and 69, which has the data for all the counties and, again, you look at the 30 percent line and, again, we look at the Harvey Gantt versus Helms race on page 68, there we see that there's a total of -- let me see if I can do my math correctly in my head -- 74 precincts less than 30 percent African American, but they all went for [*154] Mr. Gantt in the Senate race. But only 19 of those 74 are assigned to District 12. Remainder are assigned to other districts adjacent to District 12. I think that pretty well debunks the theory it's partisanship not race driving the assignment pattern of these precincts.

* * *

[*158] Q. What are the results of these analysis results reported?

A. The analyses are reported in Table 7 on page 80 of my declaration.

Q. What does that table provide in the way of [*159] information concerning the nature of participation rates in North Carolina?

A. In the Democratic primary, in the First Congressional District and the 12th Congressional District as well, I believe in all but one occurrence African Americans participated higher rates than non-African Americans in the Democratic primary. That's in Table Seven.

Q. What's Table Eight reflect?

A. That reflects the participation rates in the general elections. Again, held within the boundaries of District 11 or held within the boundaries of District 12 under challenge in this case. In there the analysis indicate that white or non-African American voters generally vote at higher rates than African Americans in the general election.

Q. What further analysis did you conduct concerning these election related issues?

A. Well, finally -- not finally but the second step was to estimate the white cross-over rates in these congressional districts using in particular, as I report in Table Nine on page 84, the general election returns because, again, as I've demonstrated in Table Eight, if African American voters are slightly disadvantaged in participation rates in the general election, then in order for African American candidates of choice to win, they [*160] have to get some degree of white

cross-over vote in these general elections in order to prevail.

What I show, and I think this has to do with the broader question about narrow tailoring, is that for the First Congressional District the worse case scenario was in 1990 when Harvey Gantt got 18 percent of the white vote in the boundaries of the challenged 1997 First Congressional District and it ranges all the way up to 46.2 percent where Mr. Campbell, the State Auditor candidate, did that well in that particular contest.

In the boundaries of the challenged 12th District, the ranges are much narrower, 35.1 percent at the low point for Mr. Gantt in 1996 running for the second time against Mr. Helms to a high of 41.8 percent that Mr. Edwards got in 1998.

* * *

[*161]Q. I'd like to focus on the electoral safeness of Congressional District 12. Where's the data reflected that indicates the results of your analysis concerning the electoral safeness of that district as drawn in 1997 Plan?

A. In the 1997 Plan recall, no elections were held within the boundaries of this particular congressional district. But, again, I reconstituted the state wide election returns within the precincts used in that particular plan and so those are, again, in Exhibit E, which is --

Q. Which is Exhibit 52?

[*162] A. Yes. Deposition Exhibit 52 and, here again, focusing in on the general election returns 1990 for this challenged District 12 which, of course, has never been used. It's 66.4 percent for Gantt. For the 1992 general election for

State Auditor, it's 66.8 percent for Campbell. 1996 election, Gantt for the U. S. Senate, Gantt gets 64.9 percent. General election for Auditor in '96, Campbell gets 65.5 percent and finally the 1998 general election for U. S. Senate, Mr. Edwards gets 69.3 percent. So all of these are results well over the 60 percent threshold to be deemed as a safe district and clearly there are votes being wasted in that district as it's been as it was configured in 1997.

Q. When you say "votes being wasted," what do you mean?

A. The sense is when you are doing districts and you have certain kinds of outcomes in mind and you have adjacent districts that are different in political composition, you might want to take some of the voters in the district that you are drawing that's overly safe and put them into adjacent district so as to make that district more competitive.

Judge Boyle: Like handicapping a race. You want to get your horses to the finish line ahead of all the other horses.

The Witness: Yes, constitutional but do it in a **[*163]** way you have voters not wasted.

Judge Boyle: So you are saying rather than handicapping it, they are making some sure things.

The Witness: My sense is District 12 is a sure thing. Again, in the challenged plan.

Judge Voorhees: If a legislator were being purely partisian, that legislator would want the optimum 60 percent in a particular district and save the overage to help his party in another district?

The Witness: Yes. The district that might have benefitted from that, with the hindsight from the '98 election,

would have been District Eight, in which there was an open seat and there was a seat that initially was a Democratic seat, but it turned over to be Republican.

Judge Boyle: If you add 20/20 hindsight, you wouldn't put so many voters that you were targeting in District 12. You might have thrown a few over to District Eight and won both elections rather than sacrificing District Eight and just winning District 12?

The Witness: Yes, sir, that's exactly correct.

* * *

[*164] Q. Dr. Weber, what do the data reflect concerning the electoral safeness of Congressional District 12?

A. Plaintiff's Exhibit 206.

[*165] Q. And this is the first page, the first portion?

A. The third page, first portion reports various analysis for past elections held within the boundaries of the precincts assigned to District 12. And so, for example, the first column reports the number of persons in the district. The second reports the black African American percentage in the population. The third column reports the black African American percentage of the VAP. The fourth is a Democratic performance measure, and I don't know how they calculated the Democratic performance measure, but in occasions in which I have seen this in the past, it's simply a sum, an average --

Ms. Smiley: Objection, Your Honor. Where he has seen it in the past has no relevance to this document.

Judge Thornburg: Answer the question.

Q. Will you continue with explaining the other columns?

A. I have seen this before in Texas. Texas NCEC was also advised in Texas -- advising the Texas legislature how to draw districts. I saw the performance measured there. I know it was an average there. The average other columns are that are going to follow.

The next column is the Democratic percent in 1990 of the U.S. Senate 66.6 percent. The next column is the 1996 Senate race general election, again, 64.2 percent. The next column is the 1996 Presidential race, 64.4 [*166] percent. The next column is the Democratic percentage for President in 1988, Michael Dukakis was the candidate, 66.5 percent. Next column is 1996 auditor in North Carolina, 65.2 percent. And we have 1996 House, which is a generic adding up of the election returns for all of the House raises within the precincts assigned to district, 1261.6 percent; 1994 House, 54.5 percent; 1992 Senate, 62.6 percent; 1996 Democratic registration, 61.9 percent. So the Democratic registration in this district is 61.9 percent. Then we have the 1996 black registration, 43.5 percent; 1990 black registration, 44.2 percent and then finally we have the Native American percentage, which is 0.41 percent.

Q. Let me ask you with respect to these data, did they change in any way your opinion concerning the electoral safeness of Congressional District 12?

A. No. It reinforced it. It's more data than I have. It reinforces my opinion.

* * *

[*167] Q. For the 1996 version of Congressional District 12, tell us what percentage of the district, as it's constructed, is African American for the Democratic **[*168]** primary.

A. My estimate, again, for 1996 is about 59 percent African American in the District 12 Democratic primary.

Q. Does that information allow you to make a judgment of whether the district is constructed in a way that's likely to denominate a candidate of choice of African American voters?

A. Yes, except for the possibility the African American community might be fractured or noncohesive. Assuming they are cohesive, the candidate of choice of African American voters will be nominated in both the 1st and 12th District.

* * *

[*181] Q. Similarly, have you reviewed the maps of the general region of Congressional District 12 with respect to black voting age population, which is, I believe, Joint Exhibit 106, the map that we have been using here today on the easel?

A. Yes, I have reviewed that.

Q. Have you reviewed maps 107 through 109 which are the individual county maps for Guilford, Forsyth and Mecklenburg Counties reflecting population?

A. And Democratic voter registration.

Q. And Democratic voter registration.

A. Yes, I have.

Q. Have you contrasted those maps with the information the maps that have been provided as exhibits -- Exhibits 253 through 258 which are maps of the results of the 1988 Court of

Appeals?

A. Yes, I have.

Q. Have you also contrasted the racial maps, which also appear as Exhibits 237 through 242 in another format with **[*182]** precinct names?

A. Yes. Those show black voting age population.

Q. As opposed to total population?

A. Right, for the those six counties.

Q. You reviewed all of those maps showing voting age population?

A. Yes, I have.

Q. Have you also contrasted the two groups of racial maps with the results for the Harvey Gantt election contest in 1990 which are reflected as a general map at 263 and as individual county maps through 268?

A. Yes, I have reviewed those also.

Ms. Smiley: Did you say 263 through --

Mr. Markham: Through 268.

Q. And as a result of those contrasts and comparisons, do you have an opinion concerning whether or not the assignment of precincts to the 1997 Congressional District 12 was predominately based on race?

A. Yes, and it reinforces clearly the opinion I gave in my declaration on Table 6 for the six counties.

* * *

[*185] Q. Next there's a series of maps beginning with number 272 and continuing to number 287. We'll just look at one map as the illustration, perhaps the map of Wayne

County, 280?

A. Okay. My book ends at 274.

Q. Map numbers were 272 to 287?

Ms. Smiley: What example are you using?

Mr. Markham: Let's use the first one, 272.

Ms. Smiley: Thank you.

Q. Is that still in the exhibit book that you have?

A. Yes, it is.

Q. And can you tell us what this map illustrates?

A. It illustrates wherever the concentration of African American population would be in this county, and you would have red dots. And so there are really two places in the **[*186]** county; one small concentration on the east side of the county on the bay and the other at the west side of the county. But these series of maps illustrate the relative concentration of African American populations in each of these counties.

Q. And what other information would benefit the Court that those maps provide?

A. Well, again, if I were to put all of these maps together and I were assessing this concentration compactness question that I assessed in my declaration, one would see basically that the -- that the areas of where African Americans live in northeastern North Carolina, they are all relatively distant from each other. There's not a sort of pattern of closeness exhibited in these series of maps and these dot matrix maps illustrate this very nicely.

Q. Let me give you the next exhibit book, which begins at Exhibit 276. Let me ask you to make a similar evaluation of the map for Mecklenburg County at number 286. Can you tell us what information of assistance to the Court that map

provides?

A. Okay. Map 286?

Q. Yes.

A. This map has the dots plotted for every 20 African American persons and in the center of the map is **[*187]** Charlotte, you know, the city of Charlotte is in the center of the map. And it shows basically that the African American population in Charlotte is on the north side, a little bit on the west side and a little to the east of the center of the city. But that's pretty much it. There's some small concentrations running up along the interstate as you are heading toward Iredell County, but other than that it's mostly in the city of Charlotte.

Q. And you've reviewed this series of maps, 272 to 287. Have you contracted them with the boundaries of the congressional districts for Congressional Districts 1 and 12?

A. Yes, I have.

Q. And have you any information concerning whether or not the boundaries in a general sense conform to the location of African American population?

A. Pretty consistently. For example, in the six counties in the 12th District, the African American populations on these maps are placed within the boundaries of the District 12.

Q. And can you tell us what relevance the next map, two maps down, 288, which is the map of the 1980s Congressional Districts in North Carolina, what relevance that map has for the issues before this Court?

A. Well, I think the maps of the previous plans, whether **[*188]** it's a map of the 80's or the map of the 70's or even a map of the 60's, all of them show how the State in using

traditional criteria, drew congressional districts and this particular map from the plan of the map of the 1970 adopted April 29, 1971, does not split a single county of the 100 in the State of North Carolina in drawing congressional districts.

Q. Sorry. You are referring to the 1970 map?

A. Yes. Maybe I pulled out the wrong exhibit.

Q. You were referring to 288 A?

A. I got into the wrong exhibit, I'm sorry. My book does not have a 288, that's why or it's out of sequence. 288 A is the plan from 1980 -- after the 1980 Census, I should say, and it reflects that there were a total of four counties split in all of North Carolina. I can't read the one county up in --

Judge Boyle: Avery.

A. Sorry, Avery, Yadkin, Moore and Johnston County were split. All the rest were composed of whole counties.

Q. Next I would draw your attention to Exhibit 288 D, which is a data sheet that comes from a Section 5 submission. Can you tell us from that information what was the most heavily African American congressional district in the 1980's?

[*189] A. That would be District 2, which if you take the 1980 Census was 41.1 percent African American where you take the calculation after the 1990 Census was available is 43.5 percent. District 2 is the most African American district at that time.

Q. Where generally is that district located?

A. That district on the east was Edgecombe County and had all of Rocky Mount in it including Nash, Wilson, a portion of Johnston and Halifax, Warren, Vance, Granville, Person, Caswell and Durham. Durham is in that district.

Q. Next we go forward to Exhibit 289, which I believe you

looked at earlier. What information does that map of the 1970's congressional district provide that would assist the Court with regard to any issues in this case?

Ms. Smiley: Objection to characterization as either of these maps, 288 or 289, providing assistance to the Court. I don't think that foundation has been laid.

Judge Thornburg: I'll let the witness answer the question.

A. These maps either now or in the plaintiffs' exhibit were originally in my declaration in 1998 because in that declaration I was trying to outline the way in which congressional district plans have developed over time in the State of North Carolina. And in the days right after the one-person, one-vote decision, the State was able to **[*190]** draw constitutional districts using whole counties.

1980, the map we just looked at in the previous Exhibit, 288 A and B, they then had to split four counties, but that's the extent to which the state had to in a sense ignore traditional redistricting principals.

1970's, they didn't and certainly in the late 60's as they were sorting out the district sizes as a result of the one-person, one-vote decision, they didn't have to draw districts split across the counties.

Q. What's the maximum number of counties necessary to split in North Carolina in order to achieve one-person, one-vote equality?

A. As a principle, you take the number of congressional districts and you have one less district minus one, so it's 11. If you start with the 1st District and you draw whole counties and you get to some place where you have to split a county, that's

one county split. Now, the Second District you draw all the whole counties and you may have to split a county. It's always one less than it, so 11 is the maximum to be split in North Carolina.

* * *

[*195] Q. In determining how would you, as a political scientist, go about determining what constitutes traditional principal, specifically in a community of interest?

A. One of them is community of interest. So there are a number of ways of defining traditional -- defining communities of interest and among them are metropolitan areas, people who live and work in the same region of the state are defined as having a community of interest. And this map in Plaintiff's Exhibit 303 clearly exhibits shows those communities of interest.

Q. And the map is exhibit -- Joint Exhibit 102 illustrates that the 1997 Plan, in fact, cuts across those communities; is that correct?

A. Yes. Well, Charlotte is in a different metropolitan area than Winston-Salem and Greensboro.

Ms. Smiley: Your Honor, I object and move to strike this whole line of testimony. Once again, the fact a political scientist thinks of these are traditional principles, I don't think any court said any legislature is required to use these maps and there's no evidence that the legislature used these maps, so I don't see they're relevant to the intent of the legislature, what it did or didn't do.

Judge Voorhees: You think the legislature was

[*196] unmindful of standard statistical metropolitan areas, is that not observed, on its face, contemplate they had no idea about SMSA?

Ms. Smiley: Well, Your Honor, first of all the SMSA, these are from 1982. I'm not sure they are current, whether these are the ones that exist. They may be aware of it, you are exactly right, in the backs of their minds, but there's no evidence they are intending to use these in any way in developing their plan. So I still would say they are not relevant.

Judge Thornburg: I overrule that and move on.

Q. Did you finish your answer, Dr. Weber, with respect to that map?

A. Well, one of the criteria that is involved in the community of interest is living in proximity to another person and SMSA's are the best way the national government has come up with with defining metropolitan areas and metropolitan areas whether it's social science or something legislature does, we're all aware of as representing one area of community interest.

* * *

[*198] Q. We looked at Exhibit 309. Is this an exhibit that you had prepared?

[*199] A. Yes. That's the exhibit that was prepared out of Defendants' Exhibit 435 to talk about the assignment of precincts to Congressional District 12 in the 1997 Plan.

Q. I'd like to go back to that Exhibit, 435.

A. Okay. I gave that book back to you at the break.

Q. Okay. Defendants' Exhibit 435. And I'd particularly like to draw your attention to the third page to the second table, which is labeled Table 6 B.2. And my question for you is: what does the information in that table indicate to you?

A. Okay. If I'm with you, I'm at Forsyth County, right?

Q. Forsyth County precincts, that's correct.

A. And I'm looking at Table 6 B.2, which has percent black population rated against percent Democratic in the 1990 Senate election. What it suggests first of all is that, of course, the African American majority precincts in Forsyth County are assigned to District 12. 13 of 13, over 70 percent and two of two over 50 percent to 60 percent, so there are 15 assigned.

If you go to the line at the top of the table, which is less than 30 percent African American, but then reports the Democratic precincts in this particular context, there are a total of eight precincts in Forsyth County that are not assigned to District 12. And only precincts mostly African American population are assigned to District 12.

[*200] Q. I'd like to draw your attention to the first line of that column which shows those precincts which are less than 30 percent African American in total population. Can you tell us how many of the precincts that voted more than 50 percent Democratic in the Senate election were included in the 12th District from that county?

A. There are none.

Q. How many were there available total?

A. Would have been eight.

Q. Are there precincts on the border of Congressional District 12, as it's constructed in 1997 Plan which are Democratic, particular in their voting behavior?

A. Yes. By comparing this data with the maps, I concluded that there are precincts in Guilford and also in precincts in Mecklenburg.

Q. Can I draw your attention to map 265? Ask you to look at this book here. I'll trade out your other book. What does the information in the map at 265 tell you with regard to that question of whether there are precincts on the border of Congressional District 12 which were available to assign on the basis of party considerations to the 12th Congressional District?

A. First of all, this map 265 displays the voter precincts by percent Democratic in 1990 Senate race between Gantt and HelMs. And the yellow line on the map **[*201]** demarks the boundary of District 12, so the area in the center of the map heading northward on the map between the yellow lines is in District 12. Everything that is not in District 12 is then assigned to District 5 in Forsyth County.

If I go to the top of the map where I see a precinct that's sticking up with a little bit of a nub toward the north that's red hatched, that's 50 to 59 percent, so that indicates Mr. Gantt carried that. If I start counting precincts, I go down. I have one, two, three, four, five, six, seven, eight, nine, ten precincts that according to the color coding on the map are indicated as having gone for Mr. Gantt in that election, all adjacent to District 12. But we're not assigned to District 12 and my theory or inference would be if this were an attempt to draw a Democratic district in Forsyth County, you would clearly wind up with those precincts, if they're to go with the other precincts east of that line so you have all of them in the center of Winston-Salem in that particular district.

Q. I would like to ask you about map 266. What

information did that map provide regarding the question of whether there are precincts along the border of the 1998/1997 verse of congressional district today which are a lined Democratic and could be assigned to the district on **[*202]** a partisian basis?

A. This is a map of Guilford County. Again, like the previous map precincts by Democratic vote in the 1997 race, the yellow line starting in the lower left-hand corner, the county goes through High Point and then nearly makes it up to Greensboro and the east side of Greensboro. There are, again, precincts that, according to the color coding, are either 50 to 59 percent African American -- or 60 not African American but Democratic, not been assigned. If I count I believe I have one, two, three, four, five, six, seven, eight, nine perhaps adjacent to District 12 in Guilford County but not, again, Democratic precincts assigned to District 12 but were assigned to District 6. If one is inferring that partisanship was the underlying motivation for the drawing of this particular District 1, again, would have assigned those precincts based on the partisian information in the data base.

Judge Voorhees: How many did you say?

The Witness: I believe there were one, two, three, four, five, six, seven, eight, nine, I believe, maybe ten, if I read the map correctly.

Q. Now, let me draw your attention to map 268 with respect to Mecklenburg County. What information does that map provide on the issue of whether there are precincts available along the border with the 1997 version of **[*203]** Congressional District 12 which if one were constructing a Democratic District 1 would have concluded?

A. This, again, is the same map now for Mecklenburg County precincts by percent Democratic vote 1997 Senate race. This delineates -- the 12th from the 9th is a purple line, so it's easier to see than in the previous map. However, again, I have some 50 to 59.9 percent precincts and 60 percent Democratic precincts in this race. If I do this I've got one, two, three, four, five, six, seven, eight, nine, ten, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 precincts that I can see right adjacent to District 12 that might have been assigned for partisian motivation for.

Judge Boyle: I'm not trying to make this too simple, but in the Order that this Court wrote in '98 Holding Summary Judgment for the plaintiffs, didn't this lay out a whole comparative exercise of those districts -- those precincts next to the 12th District that could have been included? You are just going over the same material now, aren't you?

Mr. Markham: Your Honor, those with respect to registration primarily I was focusing on the 1990 political results from the voting behavior of the voters in the 1990 Gantt\Helms contest for purposes of these questions. But certainly they are similar in their **[*204]** support for the position that there are Democratic precincts available.

Judge Boyle: Wasn't the point of that part of the Order to show by comparison the fact that certain heavily Democratically registered precincts had been left out from those that had high African American population had been included?

Mr. Markham: Yes, Your Honor, those issues dealt with voter registration which was challenged as to its accuracy or predicted value so we focused here on the 1990 Helms\Gantt

election results, which showed Democratic voter behavior rather than merely their registration, and hopefully fills a gap.

By Mr. Markham:

Q. How does this information, Dr. Weber, comport with your opinion as to the racial motivation for the construction of 12th District?

A. Overall in Exhibit 309, if one were to assume that precincts are randomly being assigned to District 12 and issue is not is it race or is it partisanship, you would have about 36 percent of all precincts assigned to District 12 and the exhibit shows that 76 of 79 precincts that are black in population, 40 percent are higher, are assigned to District 12, whereas in all of the partisan indicators they range from 56.5 percent down to 39 percent [*205] on voter registration. So, again, this is evidence it seems to me that clearly confirms the racial assignment of the precincts to District 12 and rebuts the notion that this was an assignment on the basis of partisanship.

Q. And does this exhibit reflect similar statistics concerning the other two contests or election contests the State purportedly looked at?

A. It includes the Court of Appeals and the Lieutenant Governor, taken from Dr. Peterson's exhibit.

Q. Is that generally consistent with the illustration that we just had with respect to Forsyth County?

A. To Forsyth County and Guilford County and Mecklenburg County.

Q. Do you have an opinion about whether it's necessary to draw a 12th Congressional District so elongated a manner in order to have a safe Democratic district in that region in North Carolina?

A. To have a safe Democratic district; you don't have to draw the '97 district to have a safe Democratic district.

Q. And is it necessary to draw Congressional District 12 in some elongated manner in order to have a district likely to elect candidate of choice --

A. I have seen evidence that a district based on Mecklenburg County itself would, in fact, elect an African American to the House of Representatives.

[*206] Q. I want to turn now to the issue of compactness. In your report, Exhibit 47, there's discussion that begins at page 47. Can you tell us in general terms?

A. Excuse me for a minute. I need to shuffle some of this paper in front of me.

Q. This is Exhibit 47. In general terms, where does the compactness -- the measure of the compactness of this Congressional District 12 rank among the districts of the United States Congress today?

A. Well, to give you some foundation, there are reports done in the past by election data services in Washington, D.C. that report both perimeter and dispersion measures of geographical compactness.

Professor Webster, employed by the defendants, updated the measures of compactness in I believe two different affidavits or reports for this particular case. So using all of this information, the data that I have about the old congressional districts as well as the data about the revised 1997 congressional districts, I concluded that North Carolina 12 there being 435 congressional districts ranks either 432 or 433 on the perimeter measure of exactness, so it's almost at the bottom and on the dispersion measure it's either 430 of 431, the reason I

can't come down to whether it's 431, or 432 or 433 is because Professor Webster didn't report a [*207] number for District Eight, which has been revised in the State of New York. So I don't know where Eight falls. North Carolina 12 continues to be the least compact district in North Carolina and the worst in the nation, among the worst in the nation for compactness.

* * *

[*207]Q. Let me return then to the joint exhibits. Now, let's go to the map 126 of the joint exhibits. Dr. Weber, have you had an opportunity to review a number of plans included in the Section 5 materials for 1997 to 1998 from the State of North Carolina in connection with your research in this case?

A. Yes, I've reviewed all of the plans that were made a part of this Section 5, exhibits going to the U.S.[*208] Department of Justice and this one, 126, is one of those plans. It is titled Winner/Cooperr 1.0, Winner/Cooper 1.0.

Q. Have you ever drawn a redistricting plans?

A. Yes, Sir, I have drawn many plans.

Q. Have you ever used the plan '90 software in Louisiana, which is the same vendor that North Carolina used.

Q. What information does Exhibit 126 provide to you concerning the process which led ultimately to the development of this 1997 district?

A. Well, here there are three maps. There's a map that simply for the state as a whole in a very crude way represents the districts and then there are detailed maps. One of district 1 which is 126 B, and one of District 12, which is 126 C. And then there's finally a statistical listing and this statistical listing

is very familiar to me. It's the same kind of form at -- again, that the State of Louisiana produces with their redistricting software.

Q. Now, there will be other evidence that will indicate the time during which this plan was sketched. What does the structure of that plan indicate to you?

A. For a particular district or --

Q. For District 12.

[*209] A. Oh. for District 12. In Exhibit 126 C, it's in Mecklenburg County and then it's in Iredell and then in it's in Rowan and it's in Davison and comes into Forsyth and Winston-Salem and comes a little bit into Guilford into the High Point area, but it stops at High Point in that particular plan. And in that plan demographically is 39.64 percent African American in totla population for district 12. But it's also a district that performs quite well politically. That's the third page of the report. Shows that Senator Gantt in 1990 got 62.7 percent of the vote. Rand got 57.04 in 88 and Lewis got 55.89 in '88. So that's a democratic performing district.

* * *

[*213] Q. Reviewing these maps as a group from 126 to 130, what progression can you see in the construction of the Congressional District 12?

Ms. Smiley: Object to the terminology "progression."

Judge Thornburg: Overruled, go ahead.

A. When we finally get to Cooper 3.0, which is in Exhibit 130, you will see if we look at the map for the 12th District, the map is now very similar to the map before you

on the easel, which is to say all of the previous maps didn't have Greensboro in this district and at this point now they're adding Greensboro in and there's an e-mail message that indicates that–

Ms. Smiley: Objection to the hearsay.

Judge Thornburg: Sustained.

Q. So at what point in the progression of these maps is there a change from the absence of Greensboro to the [*214] inclusion of Greensboro?

A. From Cooper 2.0 to Cooper 3.0, Greensboro has been added to the district and the African American proportion now in District 12 is 47.9 percent. In the previous map, and plan --

let me just go back here to be sure I review the right data -- that is 40.1 percent. So basically the district has been increased by almost eight percent from Cooper 2.0 to Cooper 3.0. That's when the Greensboro blacks were added to the district.

* * *

[*220] Q. Dr. Weber, where do you look to determine what North Carolinian's redistricting principles are, which are traditional?

A. We would look at the history of congressional regarding to that, so you look at the maps and the practices of the state in the past to do that. Particularly, what I guess I would characterize the post one-person, one-vote era, so we're talking about 1965 to the present.

Q. What traditional redistricting principles does your

analysis establish or subordinate to raise in the construction of the 1997 Plan?

A. You have the splitting of political subdivisions, particularly counties and cities censuses in these places. The subordination to compactness. Compactness is not -- geographical compactness is not inherent and there's also [*221] some disregard of communities of interest in this process. Those are, I think, the three major race neutral principles that are violated in the 1997 Plan.

Q. If one were drawing a district based on partisanship in the central Piedmont as a Democratic precinct, would there be a need to split District 77 in Mecklenburg County?

A. No. You can create very partisan districts simply by swapping Precinct 77 with, say, a precinct or two in Forsyth County and have the same partisan result for the purposes of drawing the district.

Q. Are there any majority black precincts in the six counties, parts of which comprise the 1997 version of the 12th District, which conceivably could be assigned to Congressional District 12 that are not assigned to Congressional District 12?

A. No. Every conceivable majority African American population perceived is assigned to District 12. There are none that could be assigned that were not assigned.

Q. I would like to ask the same question with respect to Congressional District 1. Are there any black precincts in the district that the district could have been assigned to that district but were not assigned?

A. No, but I do need to explain that. In Craven County there's a precinct by the name of Harlow that is 70.78 [*222] percent African American. But my examination of the

map and the general boundaries of the district indicate that it is too far removed. There would be more white population in between that precinct and if you were to assign that precinct as well as the adjacent white precincts, you would have fewer African Americans as a percentage in the district.

Q. Have you reviewed the facts and statistics regarding the 1st and 12th District, which are cited in the decision of the Court subsequent to the 1998 Summary Judgment?

A. Yes, I have.

Q. And are each of those facts and statistics accurate, based on your own research?

A. Yes.

Q. Have you conducted -- have your additional analyses been consistent with these data?

A. Yes.

Q. Have you ever, in any of the redistricting voting rights or *Shaw v. Reno* cases in which you have been involved, encountered a boundary segment analysis offered to explain some part of legislative intent?

A. No. This is the first case where I encountered that defense.

Q. Do you have any criticism to such analysis?

A. Within my declaration, I suggest that the analysis of **[*223]** Dr. Peterson to be, I guess what I call a complete analysis would have not only looked at the boundaries around the district, because that's really assignments at the margin, but would have started from the core of the districts. So the core would be where one would start the analysis and understand the assignment pattern of the core then one would proceed to go to the outer parts of the district to understand the total picture.

Also, in the process of ignoring the core, he ignored what we call the convergent precincts, about 80 percent of the precincts, as I understand his analysis, are suggested to be convergent. He then proceeds to count each of the segments equally and, of course, the segments are not of equal importance to the assignment patterns.

Some precincts are larger than others and so, for example, if one were going to say let's exclude Precinct X and find another precinct to put in, you have to find one of equal size to put in or out of the district. So consequently, the counting that he does is counting on equal units and, in essence, he's creating what I call an unweighted average when he should have counted and weighted average for this purpose.

Subsequent to the writing of my declaration, when we got the data and could subject it to, you know, rigorous analysis, we discovered there are 13 segments that border **[*224]** on Davie County. And we looked at the data in particular because the maps we were getting for Davie County showed no precincts. And we noticed there are no precincts in Davie County, only townships that are the political subdivisions that are used in the data base of the state.

And we noticed that all of the political data, with whether it's voter registration data or returns for the '97 race or the two races from 1988, all have the same percentages. So there's a common percentage attributed to every Davie segment so there are 13 segments that they are using the county average as the segment number and really the segments are not varying in terms of their political makeup or their racial makeup in that particular analysis.

So I would suggest that if I had encountered that, I

would simply have excluded all of those segments because they are not -- they create erroneous information about the assignment patterns undertaken by the state in that particular analysis. In assisting you with the deposition of Dr. Peterson, we prepared some exhibits that were deposition exhibits.

Q. Let me direct your attention then to Exhibit 23. From the deposition exhibits, which is the first of that series of exhibits, I'll ask if you can explain what information is conveyed in that exhibit?

A. I don't have a copy of that in front of me.

[*225] The reason these were prepared is what we were provided by Dr. Peterson's company in the state was literally not intelligible to the -- one would have to understand the coding scheme of the analysis to do this, and it took awhile to understand it, so we prepared these exhibits to display for what in his report he calls type P divergent, partisan divergent segments.

Here we're using Democratic registration and African American registration. So if you look at the top of the table, we have what's called observation 6 in the data base, which is segment 6, which has Mecklenburg Precinct 81 as the internal precinct and the external precinct is Mecklenburg Charlotte 80.

We listed each of the segments that he described as type P divergent. And in particular what I found interesting by having done this particular exercise is that whenever he's got a type P divergent segment, that type P divergence are very small. They're one or two or three percentage points at most. So what I guess, to use a cliche here, is in this exhibit for the -- I think there are 20 some, maybe 24 precincts characterized as type P divergence. He's making a mountain out of a mole hill,

which is to say the differenoes that are a discrepancy to divergence are very small and they happen to be in the direction that he would like them to be.

[*226] So, for example, the Democratic -- excuse me, the black percentage for Charlotte 80 is .1521, the black percentage for Charlotte 819, internal segment is .1484. So if you go down and make all of the comparisons, you will see one, two, three percentage points relatively trivial and, technically, if you do the difference and means test would be statistically nonsignificant types of comparisons he has in this table.

Q. Is that also true of the differences we see of those segments characterized of confirming the racial predominance here?

A. Yes. That's the next exhibit, Exhibit 24, where there are fewer of those, but those are the type that's divergent. Type P-- other thing that sort of hit me when I first prepared this, is how many of these segments are Davie County segments external. As I suggested a few minutes ago, I would exclude those segments because, again, they are simply using the same data for all of the political comparisons with those particular segments.

Q. In fact, does the analysis in any way take into account whether a precinct segment is in an area that's a land bridge connecting two areas or whether it's in one of the core counties or does it matter at all to that analysis?

A. No. At one point, I think I counted the number of **[*227]** precincts in District 12, that there's no choice. It's a single precinct that connects one piece to another piece.

You have to have the precinct in the district in order to make it contiguous, and there were in these divergent segments,

there are a number of these precincts that turned out to be divergent.

Again, you have no choice. You have to take that math, if that's the math that you are going to follow to draw a district. There are a number of those. I think I counted as many as ten or 11 of those precincts in which the state had no choice but to take that path to keep the state contiguous.

Q. Exhibit 25. Can you tell us what it provides concerning this sort of analysis?

A. 25 is an attempt to summarize for all of the six counties in the 12th District where exactly these divergent, type P divergent precincts are and where the type R divergent precincts are. As you can see from this exhibit, for example, on the type P, I believe 11 of 20 those -- no, let me start over again.

15 of those are in the interior counties, the Davidson, Iredell and Rowan counties. If you are going to connect Forsyth and Guilford and Mecklenburg together, you have to go through those three counties and 15 of the 26 type P divergent precincts are in those counties. And for **[*228]** the type R segments, it's 8 out of 15 that are in that in those counties.

The other thing that I asked to be done when this table was put together is to characterize what percentage of the African American population resides in these counties. If you take the third column over and you add that together, it adds up to a 100 percent or the three lower counties; Forsyth, Guilford and Mecklenburg. 83 percent of the African American district is in the three peripheral counties, the counties in the boundaries, the counties in between only have 12 percent of African American population in them.

Q. Exhibit 26, is that another exhibit that you prepared?

A. Yes. Here we were concerned with putting in one exhibit, again, for the purposes of the deposition with Dr. Peterson. The performance of the '92 Plan, District12 and District 1 and we had both here the black population and the percentage achieved in the general election by the congressmen and, of course, you can see in each case the performance of the district is greater than the percentage African American in the district.

Q. Next looking at Exhibit 27. Is that another exhibit that you had prepared?

A. Yes. This exhibit counts up the number of times in **[*229]** effect that I believe that either the party or the race explanation predominates and it's interesting that, in Dr. Peterson's report, he focuses primarily on the Democratic registration explanation, which is the explanation that has the greatest degree of credence for the partisan explanation, the last two columns, 23 to 13 or 20 to 12 or 26 to 15.

On the other hand, if you look at the political races and, again, using all of the segments, he has in his analysis not excluding any segments, that does not show a stark picture as the picture that Dr. Peterson conveys in his report. And, of course, we know through this deposition testimony or Section 5 history the state admits that the party registration data.

Ms. Smiley: Objection, your Honor.

Judge Thornburg: Sustained.

Q. Let me ask you: is it possible to apply the segment analysis to a district with a large number of split precincts?

A. No. Well -- technically, you could do it for the population data. Once you get to the political data, then you

have to have some mechanism whereby you can, in fact, split the population -- excuse me -- split the partisan registration data or split the political data. And, typically, with these state-wide elections, the data are **[*230]** not split in the precincts that exist. So if the precinct is split, the state has to come up with some sort of rule or the analysis has to come up with some sort of rule as to how they will allocate the particular portions to each of the districts that you do the segment analysis.

Judge Boyle: Go ahead and finish your question as to his criticism of Peterson's analysis, because I wanted to hear that answer.

Judge Thornburg: Objection went to your statement to what the state was conceding, so simply answer the question without presuming to know what the state concedes or doesn't concede.

The Witness: It is my opinion that the registration data is the least reliable data to use for purposes of talking about political performance. The best data that's in the state's data base is the 1990 Senate data, because those precincts were in existence when the data base was put together.

For example, the 1988 precincts there were changes. So there are some cases in which I don't trust the 1988 data in the state data base because they didn't, in my judgment, properly allocate the changes in the precinct lines to create the data. There's a good example in Precinct 77 where the data in 1990 makes sense given the racial composition of the precinct. And there's much **[*231]** greater support for Republican candidates for the heavy majority precinct in 1988 doesn't make sense. There's that kind of black cross-over in the two very partisan general elections. I see that in other places in the data base.

I'm most likely to trust the 1990 political data and less likely to trust the political data as to the performance.

Q. Use of the performance data rather than registration give greater support for racial rather than partisan segregation?

A. Yes.

Q. Is it possible given the problems you will have with split precincts?

Ms. Smiley: I object to his leading the witness. I believe this is an expert.

Judge Thornburg: Let's move it along. That's fine.

Q. Let me ask: is it possible to test this by applying it to other Congressional Districts which have been invalidated as predominantly race based under *Shaw v Reno*?

A. I think the analysis that Dr. Peterson has offered us could be done for other districts. You know, assuming that you get the right maps and the right data and it's done properly, I'm not sure in this case I believe it's been done properly.

[*232] Q. Is Dr. Peterson's analysis and report reliable?

A. No, it's unreliable.

Q. In your view, is it relevant to the issues before the Court?

A. Well, if we assume that the question is it party or race is an important question, it has some bearing on that question if it were appropriately done. And I suggest that it has not been appropriately done.

Q. Are there any other criticisms that you have of the analysis by Dr. Peterson?

A. If you could put a map up for me.

Q. Which map?

A. It would be the map where Iredell County abuts Davie

County. I think there's a map in our exhibits somewhere that does that. Maybe it's just the big map.

Q. We have Iredell as part of the Exhibit 106 map; is that sufficient to show the point?

A. This is not the best map to do it, but I can point out the area that's in question. What I did was knowing his segments. His data base tells me his segments. Okay, I then went along and I verified whether or not there were any segments in error. And I noted that there's a precinct in the northern part of District 12 in Iredell County that abuts Davie County, but yet there's no segment in his data base showing that any segment from Iredell **[*233]** County abuts Davie County segment, so that's an omitted segment from the analysis.

Q. Why was it in your view -- or what is your view of the importance of the convergent precincts to an analysis?

A. Well, again, if this is -- it's kind of a preponderance explanation. If 80 percent of your precincts are convergent and many, many, many of those precincts are at the core –

Judge Boyle: What's "convergent" mean? Explain it.

The Witness: It means, basically, that the racial percentage for the inside precinct is greater than the racial percentage for the outside precinct. Or for the party explanation, the Democratic percentage on the inside is greater than the Democratic percentage on the outside. That's 80 percent of the precincts.

Judge Boyle: That didn't explain it. I'm too simple to understand that. You have to use more primitive language.

The Witness: It's simply -- I'm trying to think about it. It's simply the question of what is the difference between the percentages. And if the percentage of one is greater than the

other and it is consistent with either the racial explanation, that is races inside and not outside.

[*234] Judge Thornburg: Inside the district?

The Witness: Yes, or outside the district, then that would be characterized as a convergent segment.

By Mr. Markham:

Q. And a divergent segment, in contrast, would be one where --

Ms. Smiley: Objection, your Honor.

Judge Thornburg: Overruled.

Q. It would be where party is greater outside in the outside precinct than inside. The Democratic percentage outside is greater than the Democratic percentage inside or it would be where the racial percentage outside is greater than the racial percentage inside. Those are the characteristics of the divergent precincts.

As I suggested earlier in looking at Exhibit 25, most of these divergent segments are not in Forsyth, Guilford or Mecklenburg County, but they're in the three counties that connect the ends of the district and in a number of cases they're there because they are the only path that the state chose to take with –

Judge Boyle: So you are saying it's only as a product of necessity that there would be a divergent district; where necessity is not a factor, they are all convergent?

The Witness: Yes, that's the tendency; it's not **[*235]** perfect.

Judge Voorhees: And convergent depends on which theory you are trying to prove?

The Witness: Yes, sir.

Judge Voorhees: So if you are trying to prove a racial predominate theory, then --

The Witness: No, if the theory is -- if it's race that predominates rather than party, then you will have a high percentage of convergent precincts. If you have any precincts that are divergent, they will be divergent in the direction of putting the blacker percentage of the -- or the higher African American percentage outside the district than inside the district.

Judge Boyle: But that never happens.

The Witness: It happens occasionally.

Judge Boyle: In District 12?

The Witness: It happens out of necessity, the need to draw the district in a narrow way because you have large populations in Forsyth, Guilford and Mecklenburg that anchor the district. So the geography is dictating the lines that are going on in Iredell, Rowan and Davidson.

Judge Boyle: But I thought there was no instance where you had a majority African American precinct left out of District 12.

[*236] The Witness: That's correct, not in a single one of those.

Judge Boyle: There are instances where you have a majority Democratic precinct left out, but that's because of necessity?

The Witness: No. Because, as I pointed out yesterday, there are currents in Guilford, Mecklenburg and Forsyth where demographics bordering on District 12 were not future into the district. They all happened primarily to be less than 30 percent white -- or, excuse me, less than 30 percent African American.

Judge Boyle: That's what I was just saying, the only times they are left out is where they don't have a minor

population?

The Witness: Yes, sir.

By Mr. Markham:

Q. If you analyze the segment analysis using the 1990 Helms/Gantt election, what then do the results indicate?

A. Using population as the racial comparison, it's by two for party, two greater for party than for race. For VAP, it's even 16, 16; and for registration, it's 16 per party and 13 for race. So, again, divergent segments.

Judge Boyle: But if you read the opinion in the Summary Judgment Order, it laid all of this out in detail. That was one of the anchors of the opinion was that race **[*237]** was a more pure predictor of inclusion than party?

The Witness: Yes, sir.

Judge Boyle: And what is it that we're back here to do, to hear that from you or to somehow come up with voter participation as a substitute for party? You follow the question?

The Witness: Yeah, I follow your question. I guess I don't quite know how to respond. I think the reason --

Judge Boyle: Well, that Opinion apparently relied on voter registration rather than voter participation.

The Witness: Right. And basically here.

Judge Boyle: But the two are synonymous, aren't they? There's no great distinction in performance between voter registration and voter participation when analyzing non-precincts.

The Witness: The way I analyzed participation, I'm looking at participation in the actual contest. So, for example, I analyzed participation in the Gantt/Helms race of 1990, and

my theory is that that -- is the Gantt/Helms is the best available data that the state had in its possession and used at the time that it was doing the redistricting; that is, in fact, I think reliable and accurate such that it would give them an understanding of [*238] Democratic performance or Republican performance in each of the precincts.

And, furthermore, it has the virtue of involving an African American candidate so you, in fact, could get a real test of perhaps white hostility to a Democratic candidate who happens to be African American. So I think it's a very appropriate political performance measure and a much better performance measure than the registration measure.

Q. Are those political performance measures illustrated by the maps we reviewed yesterday concerning the Helms/Gantt election, for example, for each of the urban counties?

A. Yes, they are.

Q. And we did not look in detail at the Court of Appeals race maps, but you have reviewed those. Are they also an indication that in terms of Democratic performance that there's that same type of relationship?

A. Yes, but I've already said earlier this morning that not in all cases do I trust the Court of Appeals data, because in some places the precincts changed between '88 and '90, and the state didn't, I believe, accurately translate those data.

Judge Boyle: So the state had from the '90 election data, the Bureau's most reliable basis upon which [*239] to use race and yet disguise it as party in imposing districts?

The Witness: I'm going -- I think I'm going to say no, and the reason I'm going to say no is because, in my analysis of cross-over in the Gantt/Helms race in the area of District 1 and

the area of District 12, I'd have to look back at the precise numbers. But my remembrance is that you've got pretty strong white cross-over, indicating that even though you had an African American candidate who had happened to be the Democratic nomination against Senator Helms in the context of Southern politics, Mr. Gantt did quite well among white voters.

Judge Boyle: Among white voters?

The Witness: Yes. Of course, he did very well among African American voters.

Judge Boyle: I see.

Judge Voorhees: When you say "participation" and "performance," are you using those terms interchangeably?

The Witness: No, sir, I'm not. "Participation" is simply going to the poles and voting in the contest, voting either for a Republican or Democratic. In the Democratic primary voting for the one of the Democratic candidates. The other is what percent does a Democratic candidate achieve in the election. That's the definition [*240] of performance.

Judge Boyle: But if you are trying to isolate those precincts that have a race-driven content rather than a party driven content, the Helms/Gantt race is going to give you the best indicator of that, isn't it, so that you can distinguish, say, in Mecklenburg, between a purely Democrat performing precinct and a minority Democrat performing precinct and know which is which?

The Witness: Yes.

Judge Boyle: That was the point of the question that you had a hot house example there, which you never had before, if you were a legislator that allowed you to pick and choose among what might otherwise appear to be simply generic

Democratic districts and now refine out of those the race-driven Democratic districts.

The Witness: Well, and the districts that perhaps because it's got some African American in the precincts as well as whites willing to support an African American candidate.

By Mr. Markham:

Q. Do the voting performance analysis support the same analysis the district court reflected regarding registration?

A. Yes, very consistent.

* * *

[*242]Q. Is there any particular information from these documents which bears on your analysis?

A. Yeah, if I could turn to Exhibit 211. One of the issues that this was raised perhaps as a –

Judge Voorhees: I don't seem to have 211.

The Witness: Should be the 12th District starts on page 1224.

Judge Voorhees: I can look on here.

A. I'm looking at the very last page, which is page 1227. I don't know quite how to characterize the [*243] assertion, but I think the concern was whether or not Congressman Watt, in 1998, under the circumstances of having a revised Congressional District and revised so that there was a primary in September and, of course, the general in November, whether or not the Republican challenger had the resources and the capability to make an effective race in that particular district.

The best information that I have is from this report on page 1227, which shows that John Scott, is it Kadle, I guess,

Kadle, who got 42 percent of the vote against Mr. Watt, spent $381,000. And, generally, a challenger that spends that kind of money would be regarded as a serious challenger. So the redrawing of the district didn't prevent the Republican candidate from making a serious challenge to Mr. Watt at that particular time.

Q. I'd like to draw your attention next to Exhibit 217, which is the article of Pildes and Niemi. My question for you, Dr. Weber, have you relied on that article in the preparation of your analysis and report?

A. Yes. I relied on this article for the data near the end of the article. In my report, I report some data for the geographical compactness on the 12 North Carolina Congressional Districts in the 1980's, and those data were taken from this report, page -- this article, page 572.

Then also, as I put in my report, anything about the 1992 [*244] plan that was ultimately found unconstitutional, those compactness scores come from this article, too.

Q. Okay. Next, drawing your attention to Exhibit 221. Which is the Keech and Sistrom chapter?

A. Yes, sir.

Q. Can you tell us, have you relied on this in the preparation of your analysis and report?

A. Does it -- first of all, this is a chapter from a book edited by Bernie Grofman and Chandler Davidson, and in the book they have a chapter on each of the southern states and so Bill Keech and Mr. Sistrom -- Mr. Keech used to be at the University of North Carolina Chapel Hill. He contributed to this chapter.

For me, the most important thing is to understand the

extent to which either threats of lawsuits or lawsuits in the 70's and 80's brought about changes at the local level in cities and counties of North Carolina and to understand that one of the outcomes of these lawsuits was to change the method of local districting in a way that produced greater racial segregation within the precincts; that is black precincts were created that were quite homogenously black and adjacent white areas were put in white precincts so as to afford the opportunity to have racial districts in these communities in North Carolina. And that confirms for me the point that I made in my declaration, that now **[*245]** in North Carolina many of the cities and counties are split very homogenously into black majority precincts and into white majority precincts, which can be used by the precinct processors in the State legislature to draw State legislator districts as well as Congressional districts.

Q. Switch now to Exhibit 226, which is a map of the Congressional District comparing the '92 and '97 Plans.

A. I don't have that.

Q. At Joint Exhibit 139, I'd like to ask you what information can be gained from the review of this map and/or a comparison with Joint Exhibit 106? I'll step on this side.

A. This map, it's number 226?

Q. Map 226, yes.

A. This is very similar to the map that we looked at yesterday for the 1st District where the old Congressional District of 1992 is outlined in red. And so in this map you can see you go to Durham and then you come to the northern part of Orange and Alamance counties. Ultimately you get to Greensboro and you pose in yellow is the 12th District that's under challenge in this particular case.

And what I find rather interesting is that there's a substantial overlap in the African American neighborhoods of Greensboro and Winston-Salem and Charlotte between the two maps, suggesting that the core of the old 12th **[*246]** District that was primarily African American is, at least as it's known down to the six counties in the current challenged 1997 Plan, has retained in that particular district.

* * *

[*248] Q. And next turn to Exhibits 140 through 142, which are maps of Forsyth, Guilford and Mecklenburg counties. How do these maps differently illustrate party performance **[*249]** than the maps of the Court of Appeals in the Helms/Gantt maps that we have been looking at yesterday afternoon and this morning?

A. Well, the difference in this map versus the maps that we're looking at yesterday and this morning, this simply says whether or not there were some Republican victories and the contest in question are the '90 Senate race, the '88 Lieutenant Governor race and the '88 Court of Appeals race. So if it's yellow here, it indicates there were no Republican victories in these adjacent precincts.

Yesterday I was looking at Forsyth. I also counted precincts that were not just abutting the boundaries of District 12, but if there was a precinct like the ones in yellow on Exhibit 40 and there was a precinct next to it, that might have also, in this exhibit, in fact, indicated it was a Democratic performing precinct on the 1997 race.

For example, I counted that as a precinct that could have

been assigned as a Democratic precinct by taking both of the precincts and putting them in the 12th District.

Q. So these maps, they don't show the voting performance of precincts beyond those that immediately touched the edge of the district.

A. It does not show beyond nor does it tell you what the percentage is. We don't know whether the percentage in the yellow precincts was 60 percent Democratic or 65 **[*250]** percent Democratic.

Q. Also, do these maps illustrate whether there may be precicnts inside the Congressional District, for example, in connectors that have more than one Republican victory?

A. I don't believe there are any connectors here.

Q. Do they show the voting performance or behavior of the precincts inside the district?

A. No, it does not.

Q. Is there any dispute, at least with respect to black North Carolinians, that race and party are linked in North Carolina?

A. Well, there are two very important behavioral indicators that indicate that being African American precincts, one to be a Democrat. That is, we know the percentage of African American who happen to be registered as Democrats is very, very high. Over the series of studies I have conducted from '90 to '98, Democratic candidates get high percentage of African American support, typically over 90 percent from African American voters.

Q. Can the effects of race and party be disentangled?

A. Yes, I think they can. I think we have seen in this examination yesterday and today and through the stimulation of the partison analysis and report that it, in fact, can be

disentangled.

[*251] Q. When these are disentangled, which one is predominate as an explanation for the construction of Congressional District 1 in the 1997 Plan?

A. Race is the predominate factor.

Q. When disentangled, which is the predominate explanation for the construction of Congressional District 12?

A. Race is the predominate factor.

Mr. Markham: That concludes my questions, Your Honor.

* * *

Q. You still have Exhibit 243 in front of you; it's a map?

Mr. Markham: I have it, Dr. Weber.

A. Okay.

Q. I just want to be clear. You indicate that this map shows some democratic precincts not assigned; is that correct?

A. Yes.

Q. Okay. Tell me, Dr. Weber, based on one-person, one-vote considerations, could the General Assembly have assigned all of those high-performing Democratic precincts to District 1?

[*252] A. For every precinct that they chose to assign to District 1, they would have had to have taken one or more other precincts out, so it's always a calculation to take out one that is more or less Democratic than the one you put in.

Q. So in other words, the other precincts that you were saying could have been assigned based on that map, in fact, you couldn't just assign any one or all of them or any one or more of them to the district without taking something else out?

A.That's correct, yes.

Q. So you didn't intend to leave the impression that all of those precincts should have been included in the district, did you?

A. If I had been the architect of the plan, I would have tested those options and I, of course, can't tell you with any certainty whether or not anyone tested those options.

Q. That was not my question. I asked you: you did not intend to, in any way, create the impression that the fact all of these precincts were not assigned to the district shows anything. I mean, it shows something?

A. It shows there were Democratic precincts that were not assigned.

Q. But that's all it shows, because they wouldn't have been based on population. If the district now is [*253]one-person, one-vote aligned, then you can't just assign those other precincts?

A. No, but if I were doing it, I would have to test, by taking something else out and seeing what the result was.

Q. But you didn't?

A. I did not.

Q. In fact, you have testified that the district is Democratic and strongly Democratic?

A. It performs Democratic, yes.

Q. It's voting is Democratic in the various measures?

A. Right.

Q. And, in fact, if one was going to create a Democratic district, wouldn't one take the most strongly Democratic precincts first and put them in?

A. I think you would start from the standpoint of race neutral principles.

Q. Well --

A. And then you would -- so, for example, as I suggested, that there are 12 counties in northeast North Carolina that could go into a district. After you have done that, you would test to see whether or not you have a Democratic or Republican district.

Q. Well, you're talking about something else now. When we were talking about having a map and say Democratic precincts, you are concerned about all of these precincts [*254] were assigned to District 1 and 12. But isn't it true that if you are trying to create a Democratic district, you would assign the most Democratic performing precincts?

A. But you can't -- and I'm not going to disagree with you. Yes, you would, but you can not subordinate traditional race neutral principles in the process of doing that. So, for example, you can easily take all of Mecklenburg County and find a few additional thousand people and draw. And I've seen plans in the exhibits that suggest that's a marginally Democratic district.

Q. What would happen to the other public incumbent if you took all of Mecklenburg County and essentially made it one congressional district?

A. There are currently, at the present time, two incumbents, one Democratic and one Republican, that lives in Mecklenburg County.

Q. Your suggestion that you eliminate one incumbent and draw one district and see if you can draw one Democratic district in Mecklenburg County doesn't work for the Legislature, does it?

A. I can't speak whether it would work in the Legislature or not. I'm speaking whether one follows race neutral precincts to do this.

Q. As far as you are concerned, they do not include keeping districts for your two incumbents in the county?

[*255] A. That's not one of the list of things. It's in the list there.

Q. Sir, your testimony to the Court that a legislature is acting unconstitutionally in violating and subordinating traditional race districting principles if it does consider incumbents and gives an incumbent a district?

A. No, I'm not saying that.

Q. Okay, thank you. And, in fact, in this instance you are aware that the Legislature was attempting to create a 6/6 partisan split, essentially give six Democratic districts and six Republican districts?

A. From reading the record, that's my understanding of their intent.

Q. So, therefore, creating a Democratic district in the 12th and creating a Republican 9th in Mecklenburg is consistent with the legislators' motive; is that right?

A. Yes.

Q. And if you are trying to create a Democratic district, six Democratic districts, doesn't it make sense you take your most Democratic precincts and put them in those districts?

A. No, because you have a Democratic district adjacent to District 12. And so, as I suggested yesterday, and I believe in answering one of the Court's questions, you [*256] would seek to balance. You would have fewer Democrats in the 12th and fewer Democrats in the 8th so that you would ensure that when

you have an open seed contest in 1988, the 8th would rush to Democratic or be competitive to return a Democrat to that seat.

Q. You don't know anything about political dynamics going on in the Legislature involving District 9 and 8 and 12, do you?

A. I don't recall anything in the record that dealt with any detail about those issues, no.

Q. So you don't know anything about the concerns of former Congressman Hefner in District 8 and where he might want the predominate boundary line?

A. I don't know anything about what Congressman Hefner asked.

Q. Those kinds of things may have resulted in lines that you don't like, but they are Democratic still performing districts, aren't they; District 12 is a Democratic performing district, isn't it?

A. Yes, that's clear.

Q. And, in fact, aren't there six Democratic performing districts in the '97 Plan?

A. I'd have to look at the data again to be sure of that.

Q. You only looked at 1 and 12?

[*257] A. No, I had access to the reports for all of the districts. It's just that they are not in front of me, so I can't verify that for you.

Q. Looking at as much time as you have spent looking at North Carolina politics, if you look in the 1997 Plan you can't tell the Court that District 5 is a Republican district?

A. I know District Five is.

Q. It's a heavily Republican district?

A. Once upon a time it was a Democratic district.

Q. Is it now a very heavily Republican district?
A. It's a Republican district.
Q. And District 6 is very Republican?
A. Yes, it's Republican.
Q. Is District 9 and 10 a Republican district?
A. Yes, but 8 was not a Republican district.
Q. Eight was a Democratic district. That's one of the six Democratic districts, isn't it?
A. It's now represented by Republican.
Q. So the Legislature made a mistake?
A. Perhaps they had something to do with the candidacy.
Q. That may be true, but you don't know what the Legislature was thinking about when it drew the lines for the incumbent of District 8?
A. No, I did not find anything in the record that]*258] indicated that.
Q. So you didn't inquire about any real world political issues that might have been going on that might have determined why the Legislature drew the line where it did?
A. No. I was aware that the Legislature was partisanly divided at the time that it was drawing the plan and so there are going to be some of those partisan issues involved, but analysis that I did and see is one in which race predominate district in the construction of District 12 and District 1. After that was done, then these other issues were brought along to be revolved.
Q. When you crunched the data on the '97 Plan and you concluded race was the predominate motive, you never considered any other hypothesis other than race, did you?
A. I knew Dr. Peterson had an alternative theory at the time.

Q. Let me interrupt you. Is the first time you crunched your numbers -- let me interrupt you.

Judge Thornburg: Answer the question, then explain it, if you will.

A. I need to hear the question again.
Q. When you first started crunching your number tables two and four, which you supplied to the Court in a summary judgment proceeding, the only thing you considered when you determined that race was predominate was the [*259] hypothesis of race?
A. Yes, that's true. And what I was unable to do at that time, because we were operating under very severe time constraints, I had just received Dr. Peterson's report. I knew that this was going to be an issue, but I knew that I did not have time at that time in order to explore the alternative hypothesis.
Q. My point is you already had concluded that race predominate district and never considered the political alternative until it was suggested by Dr. Peterson?
A. That's true, yes.
Q. Okay. Now, isn't it true that one of the reasons that you never considered -- that you considered race was -- sorry, I'm not ready to start asking questions. Let me start over.

Isn't it true that you only considered race because you believed the North Carolina computer system only displayed racial breakdowns and did not display political breakdowns?
A. At that time I had not seen the screens for North Carolina. I had seen the screens in Louisiana. And in Louisiana, they did not prominently display political information on the screen.
Q. Do you have your declaration, Exhibit 47, in front of

you; your declaration that was filed in this proceeding?

[*260] A. Yes.

Q. Could you turn to page 52?

A. Yes.

Q. This declaration was filed in September -- well, it was served on the parties in September of this year?

A. Yes.

Q. Just before your deposition?

A. Yes.

Q. On page 52 of Exhibit 47, could you read -- no, I'm sorry. Let's not do that. Isn't it true at that point you indicate that the computer screen used by the North Carolina Legislative GIS system displays racial breakdown as the plan design is working and does not supply political breakdowns?

A. That's my belief at the time based on the software used in Louisiana, which is the same software used in North Carolina.

Q. As I asked you in your deposition if you were familiar with the North Carolina computer system, you said yes, it's the same as Louisiana?

A. Yes.

Q. Did you ever bother to learn about the North Carolina system?

A. Yes, I have.

Q. Is that when we provided you exhibits showing [*261] photographs of the computer screen?

A. No, I subsequently asked counsel to inquire on that matter.

Q. When I deposed you, you still believed that the person drawing the districts could only see racial data?

A. That's correct, yes.

Q. That was one of the bases for your concluding that you only needed to look at race data, isn't it?

A. Yes. I now looked at the screens. I can see it's very inconvenient to explain political data, much more convenient to display racial data.

Q. But you were -- this was not correct and you based your whole -- you based your reasons -- excuse me. You were not correct about the computer screens in the data available to the General Assembly?

A. That is correct, yes.

Q. In Tables One to Four in your Exhibit 47, you found that race predominate district because the portions of split counties and towns were more heavily African American, which assigned to District 12 or district 1 and more white when assigned to an adjacent district?

A. That's part of the inference, yes.

Q. Haven't you also testified that African Americans are probably the most reliable Democrats?

A. Yes.

[*262] Q. And they register and vote heavily as Democrats?

A. Yes, that's true.

Q. I think percentage you have been using is 95 to 97 percent?

A. As registered Democrats, yes.

Q. Okay. Doesn't it follow then that the assignment of high African American -- if you find the assignment of African American precincts District 1 and 12 is not inconsistent with a political motivation, is it?

A. It's inconsistent, as some of the white precincts are Democratic as well.

Q. Are the white precincts as heavily Democratic?

A. No.

Q. In terms of saying the most Democratic heavily precincts, it's not inconsistent with political motivation, is it?

A. If the goal, as I believe the goal to be, is to create a district with as large a percentage African American population, as large a Democratic percentage as African American, that's not an inconsistent conclusion.

Q. I's also not inconsistent with a conclusion that politics predominate district, is it?

A. It is inconsistent if you assign all of the majority African American precincts to either District 12 or District 1 and then you don't assign certain Democratic **[*263]** precincts to it. The theory would be that if you are going to assign and create Democratic districts, then you would assign Democratic precincts.

Q. But, Dr. Weber, your Tables One to Four do not pick and choose between precincts. You just said if you don't assign particular white precincts, your table does not distinguish whether a white Democratic precinct is right next to District 1 or is somewhere out there in the county somewhere; isn't that right?

A. No. I know that because of the maps, but Table One, Two, Three and Four is about split counties and split cities. The precincts are dealt within table five.

Q. That's right. But your split counties -- all right. let's talk about table five. There you are, you have after American precincts, you show where they are assigned to the different

districts?

A. Yes, ma'am.

Q. Isn't it assignment of the heavily Democratic precincts. Wouldn't you get the same Table Ffive if you -- excuse me. Wouldn't you get the same Table Five with the racial breakdown if what the Legislature did was assign a heavily Democratic precinct?

A. You might at the top have the same precincts. As you get down further to the middle of the table, you would have deviations from the pattern of racial assignment **[*264]** versus political assignment.

Q. Are you talking about Table Six now?

A. No, I'm saying if one were to have put the political data into Table Five as well as the racial data and then you sorted the table based upon, say, the 1990 Gantt/Helms race, there would be some precincts at the top that would be the same in both tables. But as you go down in there, you would have some Democratic precincts that would be higher in the Democratic table versus those that are in the racial table.

Q. But you still would have created a Democratic performing district and you would have started with your heaviest Democrats or most loyal Democrats?

A. If you had chosen to do that, there are adjacent areas in Forsyth, Guilford and Mecklenburg County that are Democratic that are not assigned to District 12.

* * *

[*269] Q. Your tables one through five, where you are looking at the assignment of African American precincts and

other precincts, it would be fair to say that's purely [*270] circumstantial evidence, isn't it?

A. I don't consider myself an expert on evidence, but Iheard that term used to describe the kind of work that I'm doing, yes.

Q. Well, it could be when you look at your data, you might see a racial split on the raw numbers. That's what some of your data is showing, right?

A. Yes.

Q. It could be there's a non-racial motive for a split county or split precinct that wouldn't be reflected in your data; isn't that correct?

A. There are some counties in Table Two, for example, that I would assert are not racial, but they are not assigned to District 12 or 1.

Q. If you don't add that extra piece of information that those are county lines that are dividing those towns, then you could just conclude that race predominate district?

A. No. I did put an asterisk in Table Three and Table Four whenever the county lines split the community, and that's noted in that data base. For example, best example is Rocky Mount.

Q. And you did -- you took that information and you put those stars on your table. But that's not something you would know when you had just taken your tables and run the data?

[*271] A. No. All of this has to be done in conjunction with maps. You can't address this without the maps that you are using.

Q. Well, if there was direct evidence and testimony that a particular town was split so that a military base could be put

into a particular district, that wouldn't show up on your tables, would it?

A. No, it wouldn't. I'd have to go to the record to know that took place.

Q. But that would defeat a racial interpretation of your data for that town?

A. No. My experience in terms of how military bases have been dealt with in congressional redistricting suggests that typically Democratic incumbents want military bases so that they can have nonvoters in their districts, and I speak of that as a Democrat.

Q. What if I told you that military base was put into District Three, which is a Republican district, with the intent of the Legislature to keep a Republican?

A. It's a marginal Republican district, but the overall pattern that I have seen around the country is Democratic incumbents want --

Q. That overall pattern does not fit the facts in North Carolina.

A. In that particular one case, it does not fit that [*272] fact, no.

Q. But then your data tables don't reflect any of the real life decisions made by legislators such as that, do they?

A. No. It reports the data as the decision was made and adopted and precleared by the Department of Justice.

Q. Now, I think your data does not go quite that far, but it merely reports there are some racial divisions from which you concluded race predominate?

A. That's correct.

Q. But direct evidence could show that any number of

those divisions had nothing to do with race?

A. It's possible for that to happen, yes.

Q. For purposes of your analysis, you don't need to know or care to know?

A. No. I do -- again, I read the record and if the record speaks to it, I know it. If the record doesn't speak to it, I wasn't personally present always here in Rleigh when the plan was adopted. I wasn't sitting by the computer watching the man move the mouse.

Q. You don't know anything about North Carolina politics?

A. I would submit that's not true.

Q. Well --

A. You could probably stump me with some trivia, [*273] certainly.

Q. I certainly would not care to stump you with trivia, but you don't contend that you know the political issues that were before the legislature when it drew the 1997 particular ones relating to particular incumbents?

A. I don't know the gambit of all the issues, no.

Q. You don't know the House was controlled by the Republicans and Senate controlled by Democrats?

A. That's true, and I know that. How would I say -- I know there was concern with preserving the two African American majority districts. It's evident in the '97 Plan that that concern was met.

Q. You didn't see any concern by the Legislature. The plan was to maintain a partisan 6/6 split?

A. Did not result in a partisan 6/6 split.

Q. Based on the performance data, the districts were supposed to be a 6/6 split, weren't they?

A. That's my understanding, yes.

Q. You looked at all the performance data?

A. Yes.

Q. You looked at the ncec data?

A. Yes.

Q. Wasn't there a democratic performance number for each of the 12 districts?

A. Yes, there is.

[*274] Q. And isn't it also true that based on, say, the NCEC performance data that there would be at least six Democratic districts?

A. I'd have to confirm that, again, because I don't have that in front of me.

Q. So you only cared that two African American incumbents had safe Democratic districts and you didn't bother to look to see if what the Legislature was saying was true, whether or not, in fact, it preserved a 6/6 Democratic split for Democratic incumbents?

A. I can look at it, but I don't have the data in front of me to confirm it.

Q. Since that's the Legislature's -- since what the Legislature is saying, they were drawing districts based on politics, wouldn't you have looked to see if, in fact, that was true?

A. Yes. I can't confirm it for you because I don't have the data in front of me.

Q. But you do remember the racial data. You do remember?

A. That is so stark. It stands right out.

Q. And the political data is not as stark?

A. No.
Q. I thought you said these were very safe districts?
A. There are probably seven or eight that are quite [*275] safe.
Q. Seven or eight are quite safe?
A. Yes.
Q. Are a number of those Republican?
A. Some of them are Republican, yes.
Q. Do you think if the Legislature, if the members of the House thought it was not at least six Republican districts that they would have agreed to the plan? You are a political scientist?
A. Right.
Q. I mean, doesn't common sense say that somebody thought in the House of Representatives of North Carolina that Republicans were to get six districts?
A. I suspect that was the goal, yes, to get six districts.
Q. And as a political scientist, you would say that the Democrats felt they made their best efforts to create six Democratic districts?
A. I doubt whether or not they would say they made the best effort.
Q. As a political scientist --
A. I can only assess it from hindsight now because of what happened in the '98 election. Again, several of those districts were not even drawn in '97, because the '97 12th District and adjacent districts had to be redrawn [*276] so the '98 election was conducted in somewhat different districts in the center Piedmont area of North Carolina.
Q. You keep wanting to talk about District 8. Isn't it true

the incumbent did not run in 1998 in District 8?
A. That's correct.
Q. Did the Legislature, to your knowledge, know when they drew the 1997 Plan the incumbent in the 8th District did not intend to run or would not run?
A. My understanding his announcement came in early January of 1998. I may be wrong by a month or so, but I believe that's when he formally announced he was not going to run.
Q. And since he was running as an incumbent, as a political scientist, do you infer that the Legislature, the Democratic party of the legislature thought that District 8 would remain in Democratic hands?
A. Yes. But that district was not used in 1998. It would be reasonable for them to expect that the district that they drew, which was invalidated as a result of invalidating District 12, might have been a Democratic district.
Q. So then you keep referencing the fact that a Democrat lost in the 8th District, then all of your references that you have been making to the 8th District and the Democrat losing are irrelevant since they don't relate to the 1997 [*277] plan?
A. Well, there were counties of overlap, but there were some counties that were --
Q. I wondered why you kept talking about the Democratic loss in each district, but it was under the 1998 Plan, so it doesn't matter anyway.

You did a number of analyses about the District 1 and 12 to determine that they were safe Democratic districts; is that correct?
A. Yes, but I also looked at participation and took that into

account.

Q. I'm just talking about safe districts.

A. Yes.

Q. You did that?

A. Yes.

Q. And you did not look at the other ten districts yourself. You did not take the same political data and run the same numbers to determine anything about the safeness of the other ten districts; is that correct?

A. That is correct, yes.

Q. Is that because you were only concerned with whether or not the two districts that had African American incumbents were safe?

A. No. It was really a resource issue. It was time and resources.

[*278] Q. Okay. Now, a few moments ago, am I correct in understanding, as a political scientist, I guess, or personally, and you can answer it either way, you disapprove of the general tendency of legislators to create noncompetitive districts?

A. That is as a political scientist, yes.

Q. As a political scientist?

A. Yes.

Q. Is that because you don't believe the country or voters need a lot of safe congressional seats?

A. No. The theory is different. It is to say if voters want to have an opportunity to go to the polls in general elections and technically throw the rascals out, if the rascals have drawn the districts in ways that it's virtually difficult to do that, why should a person vote? You might argue with a person, just don't bother to show up and vote because it won't matter,

particularly if you are in the minority party.

Q. In the real world, the Legislature, this interest in not having -- excuse me, I have my double negatives.

In the real world of the Legislature, they are not interested in having all the seats competitive; isn't that correct?

A. Well, my experience in studying this across the country and having been advising state legislators on [*279] occasion on these issues, I generally observe that politicians want to have safer districts rather than competitive districts.

Q. And that's not anything based on race, is it?

A. Well, race can be used to accomplish that.

Q. But you said that's a general tendency?

A. Whether you are talking to an African American member of the Legislature or white member of the Legislature, when they are talking about their own seats, they are very interested in that when doing congressional districts they take that into account as well.

Q. I believe, consistent with this, when you gave your deposition, you didn't think much of the idea of a legislature maintaining a core of an incumbent's district?

A. Well, if it means that maintaining the core means you are going to ignore race neutral principles, then you have to put aside the notion of preserving the core. Seems to me preimminent is this notion of applying race principles in the area of redistricting. If you don't apply the race principles and you ignore them and they do things like preserve the core history, that's suspect.

Q. For the Legislature, when it is preserving the core of a district, is it also looking at trying not to disrupt the election, the -- is the Legislature looking at not trying to disrupt the

relationship of an incumbent and its [*280] voters?

A. Generally incumbents do not want to disrupt this relationship. Whatever they end up -- whatever districts they end up with, they tend to, in the end, like and wish to preserve as long as they can. That's been an observation over decades and decades of the study of redistricting.

Q. And there are benefits to the incumbent because he knows his voters?

A. Yes, of course.

Q. But they also know their incumbent?

A. But if they happen to be in the minor pattern, they might be marginalized or submerged within a district drawn for partisan of the other party and, in effect, they don't have as much opportunity to throw the rascals out if they want to throw the rascals out.

Q. So preserving the core of the district is something that legislators practice, and it's not necessarily racial at all; isn't that true?

A. That's true. It's practiced every time this occurs.

Q. And that's not only traditional, but probably historical traditional redistricting criteria?

A. It is historical and traditional, but it is not race neutral.

Q. But it's not necessarily racially motivated either, [*281] is it?

A. Not necessarily, no.

Q. Dr. Weber, would it be fair to say that in the redistricting process, you don't really trust leaving redistricting to the legislators?

A. I think that's a conclusion that I have reached and I have said it in my academic writing.

Q. In fact, didn't you tell me that you thought that the best results, what happened in Louisiana and Georgia after their congressional districts were overturned, that they let the federal Judges draw the districts?

A. Yes. The federal Judges in those two states happened to draw what I think are the fairest districts for the 90's.

Q. Now, in your report, you've talked some about the 1980's plan, the congressional redistricting plan?

A. Yes.

Q. I believe you went so far as to say that you felt that that should be the benchmark for looking at the '97 Plan; is that right?

A. It should be the benchmark for all activities in the 1990's until there's a constitutional plan adopted. That was the last constitutional plan.

Q. But isn't it true using the 1980's plan as a benchmark is a little difficult because it only had 11[*282] congressional districts?

A. For the purposes of simply population, it would be a difficult benchmark to follow, but for purposes of assessing the race neutrality of that plan versus the race consciousness or the race predominance of the 90's, it's a very appropriate benchmark.

Q. And isn't it true that the legislator in the 90's -- and this includes in 1997 -- they had to put that 12th District somewhere; isn't that correct?

A. Yes. There has to be a 12th District because population mandates it, yes.

Q. And didn't you tell me previously that the greatest population growth between the 1980's and 90's in North

Carolina was the Triad and Piedmont area from Charlotte to Durham?

A. Yes.

Q. So it makes sense, if you have to put another district in, put it there?

A. Yes. That's exactly what the Legislature did in the 1981 Plan, put a district in the counties between Charlotte and Winston-Salem.

Q. As a matter of population, that's not unconstitutional to put the district there?

A No. At that part of the state at the time, it was a race neutral plan.

[*283] Q. And in 1997, because of the population in that area, it would still make sense to put a district in that Piedmont area?

A. But you do not need to put a district between Charlotte and Greensboro, Winston-Salem.

Q. Well, in 1997, is it necessary to disrupt all the other districts even more? Why not put your Democratic district there?

A. The disruption occurred in 1992 and continued for '94 and '96.

Q. Is there anything unconstitutional that you know of about the desire to put a Democratic district, make a Democratic district the 12th District Democratic?

A. To make it Democratic, no, there's nothing.

Q. And, in fact, the legislature succeeded in keeping and making the 12th District Democratic?

A. Yes, less Democratic than the 1992 Plan, but it is still Democratic.

Q. Well, they had to cure the constitutional defects, didn't they?

A. Yes.

Q. It's not over 50 percent African American district, is it?

A. No.

Q. By putting a Democratic district there, the [*284] legislature was able to meet its goal of maintaining a 6/6 partisan balance in the congressional districts?

A. Alternatively, it could have done as 1991 and put all of Mecklenburg County together as an adjacent area had a marginally --

Q. What would that have done to the Republican in District 9 and Democrat in District 8?

A. You would have a very competitive race with one of them losing their seat.

Q. Wouldn't you say that the incumbents who would be affected by such a plan might have had strong words and concerns with the Legislature?

A. Again, the question is, is it constitutionally -- guess if it's not constitutional then the whole question of incumbent protection has to go away when constitutional questions arise.

Q. Well, Dr. Weber, it's not unconstitutional for a state to draw a districting plan that's balanced 6/6, is it?

A. As long as they do it in a race neutral way and don't support a traditional race neutral principles.

Q. And drawing a 6/6 partisan balanced district would not be a democratic gerrymander, would it?

A. It would be a bipartisan gerrymandering in that sense.

[*285] Q. So -- but you think the Legislature to obey some neutral redistricting principles had to disrupt the Republican in

District 9 and the Democrat in District 8 and draw a different district there. They couldn't draw this district?

A. That's correct, yes.

Q. Now, turning to your Table 6, which is in your Exhibit 47.

A. Yes, ma'am, I'm there.

Q. Did you do an Exhibit 309 that related to those tables or am I in error?

A. I believe Exhibit 309 so related to Defendant's Exhibit 434 or maybe 435 -- no, 435.

Q. Let's look at Table 6, Exhibit 47 starting at page 68.

I think when you testified about this table, you were talking about this shows some Democratic precincts that are not put into District 12; is that correct?

A. Yes.

Q. Okay. Now, this table does not take into account, does it, where any of these precincts are located?

A. No, I have to have the maps to go with this to do that.

Q. When you sat there on the witness stand and added up the number of precincts of Democratic precincts not put in [*286] the district, you did not intend to imply that all of the ones that you listed here that are high-performing Democratic precincts could, in fact, geographically even go in the district?

A. No, I later did that with the maps.

Q. Did you -- in fact, when you looked at the map, did you, in fact, correlate them with the numbers you added up here? Can you take the numbers -- when you added up here, you said there are eight precincts here that are highly Democratic that should have been in. Did you go to the map and find those eight precincts?

A. I went to the map and found the precincts and came back to the tables and looked at the tables.

Q. You found the eight exact precincts?

A. For Forsyth County, I did.

Q. Well, then you did determine that all of those precincts geographically couldn't go in the district, didn't you? If you went and looked at the map, isn't it true that whatever you added up here, you went and looked at the map, you would find all of those numbers you added up could not geographically go into the district?

A. Not all of them, yes.

Q. And you didn't do a chart for us to say how many could or couldn't?

A. No, I didn't.

[*287] Q. You added up numbers, said look at all the Democratic precincts based on the chart that aren't in the district?

A. That's correct.

Q. But nothing to say geographically they could go in the district?

A. No.

That doesn't correlate necessarily with the numbers you were informing the Court about, does it?

A. No. Those were based on the map.

Q. I'm talking about you sat there on the stand and added up, said you go here and add all of these Democratic performing districts. You have x number that are not in the district?

A. That is correct, yes.

Q. All right. Isn't it also true when you look at these tables

and you add them up, say these highly performing Democratic precincts were not put in the district. Isn't it true that you can't fit all of these Democratic performing districts in the district? They would bust one-person, one-vote?

A. You would have to take other precincts out. If you focus on Table 6 on Mecklenburg County, you could put all of Mecklenburg County in one precinct.

Q You don't know whether the Legislature would have to take out a higher Democratic performing precinct just to **[*288]** put in one of these that you thought should go on in?

A. You would have to make a choice which one should go out and you have to do that every time you do this.

Q. That choice could be based on Democratic performance?

A. Could be based on Democratic performance, yes.

Q. Your chart here is showing some higher Democratic precincts were not put in, does not tell you that the decision was based on race, it may have been based on one-person, one-vote?

A. If you look at the rest of the table, all the majority African American precincts are put in District 12, every one of them.

Q. But you already testified those are the most Democratic performing precincts in North Carolina?

A. Yes, they are.

Q. And doesn't it make political sense to put the most Democratic performing precincts into District 12 if you are trying to create a democratic district?

A. You can draw Democratic districts without putting all of the African American majority precincts into the district.

Q. Without disrupting all the Republican incumbents?

A. Yes.

Q. I'm sorry, I don't think I ever saw that plan.

A. As I answered the questions on direct to Mr. Markham, **[*289]** you can take Precinct 877 out and still have a Democratic performing district in Mecklenburg and all the rest of the counties. You can take other African majority precincts out. That's what happened in the 1998 Plan. They took all of Guilford County out and it's still performing Democratic.

Q. What if the direct evidence showed that the south eastern side of Mecklenburg that's in District 9 -- that's connected to District 9 by Precinct 77 -- what if the direct evidence were the incumbent in District 9 would want those precincts in the district?

A. In this hypothetical, we would be taking 77 out of 12 and putting it in 9, so you would have a broader corridor between the eastern part of Mecklenburg County and the western part of Mecklenburg County and you just substitute another Democratic precinct from somewhere else in the precinct to go in 77.

Q. You, of course, have no constraints based on any incumbents or legislator's wishes about how you draw the district, do you?

A. Right. I know this, there's no incumbent who has a residence in Precinct 77. So that would not --

Q. There's not anybody who lives in Precinct 77?

A. Yes. There is, there's a substantial population.

Q. Not the part assigned to District 9, okay?

[*290] A. Yes.

* * *

[*290]Q. Now, Dr. Weber, earlier in your testimony -- or yesterday in your testimony, you referred to Exhibits 265, 266 and 268 I'm not asking you to pull them out, which were thematic maps of Forsyth, Mecklenburg and Guilford County. Do you recall these maps?

A. Yes, ma'am, I do.

Q. You were counting adjacent precincts that you contended should have been included in the 12th District, as I recall?

A. That's correct.

Q. Because they were high performing in that particular election?

A. That one single election, yes.

Q. Your counsel had you look at Joint Exhibit 140 [*291] earlier today. Excuse me, 140. You still have exhibit 140, 141, 142 up there?

A. No, I don't.

Q. Okay.

Ms. Smiley: May I approach the witness, Your Honor?

Judge Thornburg: Yes.

By Ms. Smiley:

Q. If you would look at Joint Exhibit 142. I'm sorry, there may be an index in the front.

A. Yeah. I'm there now, okay.

Q. All right. Now, I believe you testified that what this map shows is the elections in all three results that are on the North Carolina computer system are tabulated, and I believe the data is right behind as part of the exhibit, where that takes each precinct that goes around Mecklenburg County and it

has the election results and the three elections that are on the North Carolina computer data base; is that right?

A. That's correct.

Q. It tallies the data -- tallies up the number of Republican victories; is that correct?

A. That's correct.

Q. And Exhibit 142 is the thematic map showing the Republican victories in the precincts that surround that [*292] portion of Mecklenburg County in District 12; is that correct?

A. That's correct.

Q. And correct me if I'm wrong, but in terms in immediately adjacent precincts it looks like there's only one Democratic performing precinct that immediately abuts District 12 in Mecklenburg County. Is that how you would read this map?

A. Yes. I see one precinct in yellow. It's Charlotte Precinct 10.

Q. And would you infer, because that one precinct is not in District 12, that there's a racial motive about that district line where they put that precinct in the District 12?

A. No. My inference is there were other precincts carried by Harvey Gantt in 1990 against Senator Helms. I would put all of those precincts in there because that's the most recent and best indication of democratic performance for African American candidate in Charlotte Mecklenburg.

Q. If you were trying to recreate a partisan Democratic precinct and not a precinct for African Americans, would you just use the Gantt election?

A Yes, because I'm particularly concerned about the

accuracy of the '88 data for those two races in [*293] Charlotte/Mecklenburg.

Q. But that's your concern about the accuracy for that?

A. That's correct.

Q. In your review of the record and depositions and other things, have you heard that, in fact, the Legislature, when it wanted to look at Democratic performance, tended to look at the Court of Appeals race and the Rand/Smith race because they were more truly indicative of Republican Democratic strength?

A. I don't remember particularly where they said yes it was the '88 race or '90 race. All I know is I have concerns about the reliability of the '88 data. Perhaps those concerns were never expressed to the Legislature.

Q. But do you have any information that the Legislature did not rely on political data in its computer data base because it had the kind of concerns that you had about the data?

A. No, I do not believe they were told those concerns.

Q. But you, in fact -- do you, in fact, know whether or not they used the data that's in the data base with or without the concerns you have?

A. I know it's in the data base and I believe Mr. Cohen, in his deposition, indicated that the data were sometimes used. Now, whether they used it in this part of drawing the district, I don't know.

[*294] Q. Well, you want to draw inferences based on the fact that you think the Legislature should have used that 1990 election. But if that's not what they used, isn't it better to look at all the data that they used?

A. The best data, in my opinion, is the 1990 Senate race. The 1988 races are less reliable.

Q. And that might not comport with the reality over at the Legislature when it was trying to draw districts?

A. I don't know what they did.

Q. Okay. But based on this map it looks like the Mecklenburg County -- they did a pretty good job of finding -- of staying within a city of Republicans?

A. If you accept the accuracy of the 1998 data. If this 1998 data is wrong and these other precincts are Democratic in '88, if you could properly allocate them from the '88 precincts to the '90 precincts, I would be more convinced.

Q. That's the problem with experts and legislators, they use the data that's in the machine.

All right. Now, turning to the other two maps, let's start with Guilford County, which is Exhibit 141. Once again, you do find that there is a strong wall of Republicans going around the vast majority of District 12 in Guilford County?

A. There are four precincts, according to your data, did [*295] not go Republican in these three races.

Q. My question was the vast majority are --

A. Well, the vast majority were the three Republican victories, two Republican and one --

Q. -- there are four precincts that didn't get included?

A. That's right, and there are additional ones adjacent to those. Again, in my map suggested they might have been added as well as even though they are not immediately next to District 12.

Q. But the problem with your thematic maps is it doesn't

take into consideration things like maybe physical boundaries, street boundaries?

A. Neither does this map.

Q. Well, you don't know in effect whether or not these precincts were excluded by a major thoroughfare in Guilford County, do you?

A. No, I don't.

Q. You also don't know if there were other considerations dealing with an incumbent in Guilford County?

A. I can't imagine why a Republican incumbent would want a Democratic precinct; perhaps he did.

Q. If the incumbent was from the city of Greensboro; might he want Greensboro precincts?

A. Equally he would probably want marginally Republican **[*296]** precincts.

Q. Then there's the issue of one-person, one-vote, isn't there?

A. Yes. That's why you take out precincts and put precincts in.

Q. Exhibit 140, the thematic map of Forsyth County, there is a Republican wall. Every one except on the left-hand side of District 12 in Forsyth County; is that correct?

A. Yes.

Mr. Markham: I object to the Republican wall. We said the internal precincts are not colored. I don't believe it's clear whether or not some of the ones in the connector may have voted Republican on all three occasions.

Judge Thornburg: We have no problem with understanding what they are talking about. All right, go

ahead.

By Ms. Smiley:

Q. I believe you pointed quite a bit to these Democratic precincts that were not included in the 12th District?

A. Yes.

Q. Now, do you know of any other reasons in the Legislature, that are not based on this kind of data, why those precincts might not have been put into the 12th **[*297]** District?

A. I remember reading in the record Congressman Burr wanted as many Republicans in his district as possible, since that's his home area.

Q. Do you remember anything about where he lives?

A. No, I don't know precisely where he lives. I think somewhere in the record there's indication of the precincts, perhaps in the stipulations, but I don't know exactly where Congressman Burr lives.

Q. So there might be some nonpolitical and nonracial reasons that explain that group of yellow precincts?

A. He wanted Winston-Salem precincts and he was willing to take Democratic Winston-Salem precincts, even though this was a Democratic plan.

Q. So the Democrats, in order to come to a compromise with the Republicans in the Legislature, didn't get everything they wanted?

A. I don't remember seeing any of the earlier plans that incorporated any of these precincts. I don't believe these precincts were involved in District 12 early in the process of '96 or '97.

Q. One of the real world reality, when you say a

Democratic precinct is not included, there may be factors such as the Democrats couldn't get every Democratic precinct for in dealing with the other?

[*298] A. I don't know that.

Q. That's right. You just can't know that from the data you are looking at?

A. But as a political scientist looking at the data, the best partisan explanation would be to take the partisan precincts.

Q. You referenced the Pildes and Niemi article?

A. Yes, ma'am.

Q. About compactness?

A. Yes.

Q. Isn't it true that Pildes and Niemi, in terms they created these dispersions and compactness measures, and you have an article in here where they compared congressional districts nationwide; is that correct?

A. Yes. They did not create these. These were created by persons at a company called Election Data Systems. They made these available to Pildes and Niemi and also, in some of the discussions, in my report I reference a David Huckabee at the Congressional Research Service. He had the same scores made available to him.

Q. Dr. webster, you read his report and he got numbers like Pildes and Niemi in North Carolina districts?

A. For the old districts, similar numbers, yes.

Q. It's fairly accepted in terms of if you are going to do the mathematical measures of compactness, these are [*299] formulas experts share and people have the data and you share that data?

A. It's generally accepted the two most commonly reported upon are the dispersion and compactness.

Q. Isn't it true Pildes and Niemi established a benchmark for determining whether a district is compact or not under those measures?

A. They suggest there's a score below, which you want to become concerned about the geographical compactness of the congressional districts.

Q. Although they would not conclude just because it fell below that score it was necessarily not compact?

A. No, they suggested it raises the flag. The investigator would want to go into other information and determine what was it that caused the district to be created.

Q. Isn't it true that District 1 is above that benchmark on both perimeter and dispersions measures?

A. Yes, it is.

Q. So Pildes and Niemi would not raise any red flags?

A. For District 1, that's correct.

Q. Now, you talked -- you also showed us an article and looked at the financing of the Republican candidate in the 1998 general election who ran against incumbent Watt?

A. Yes. That was in the Almanac of the American [*300] Politics letter.

Q. You were satisfied he had sufficient finances?

A. The challenger had 381,000 to spend against 687 for Congressman Watt. I think most political scientists would tell you that's a reasonable amount of money. So one could, in fact, spend the money on vote mobilizing and vote persuasion kind of techniques to make them a credible candidate in that race.

Q. Well, you are aware that six Republicans ran in the primary?

A. Yes, I am.

Q. Okay. And you are aware that none of them came even close to 40 percent?

A. Right. It was a very divided Republican Party electorate in the primary.

Q. In fact, did anyone even obtain as much as 25 percent of the vote?

A. I don't remember the precise numbers.

Q. But it was pretty split; the percentages were far below 40 percent?

A. Very divided.

Q. And there was no runoff?

A. That's correct.

Q. Well, wouldn't that indicate to you that perhaps the Republicans were not able to put forth their best

[*301] candidates since they didn't get to have a runoff?

A. Not necessarily. All over the country -- practically every part of the country, except a few southern states, you give the nomination to the person who gets the most votes. So it's common to have less than 50 percent of the vote and be the nominee of the party.

* * *

[*306] Q. All right. In your report, which is exhibit 47, at pages 74 and 75,

A. Yes, ma'am.

Q. You do a discussion about whether or not you can

draw -- whether or not you can create an African American majority district in the area that it encompasses District **[*307]** 1; is that correct?

A. Yes. Begins on page 75, paragraph 73.

Q. But I notice your methodology, when you talk about, I believe it's on paragraph 75, and you said when you group whole counties, when you got those whole counties grouped together, the total population of the African Americans, the most you can make it was 42.91 percent; is that correct? That's on page 77, paragraph 75.

A. Yes. 42.91 percent African American of the total population.

Q. Dr. Weber, did you testify that you have given -- advised legislators about complying with voting rights act issues?

A. Yes.

Q. Is it your testimony to the Court that you would advise a Legislature, in attempting to comply with voting rights act, that if it could not create a majority African American district using whole counties that, in fact, they could forget the voting rights act?

A. I don't remember words to that effect.

Q. You are not then -- then why in the world is your methodology here of using whole counties relevant to any issue of whether or not you can create a majority black precinct in the area encompassing District 1?

A. It's relevant because it's applying race neutral **[*308]** principles and in drawing a constitutional plan to comply with Section 2, one has got to incorporate the two elements. So you are not only talking about compliance with Section 2,

but you have to draw a reasonably exacted language in Gingles of geographically concentrated and sufficiently numerous.

Q. Then you are testifying that a state, if it cannot draw an African American precinct using whole counties, does not have to comply with Section 2 of the Voting Rights Act?

A In this particular case, my analysis suggests there's no reason to believe if you have been sued by Plaintiffs in 1991, '92 because you failed to draw a majority\minor district that you would have lost that lawsuit.

Q. But in your analysis on page 75, you are using whole counties and you say using whole counties you can only get it up to 42.91 percent?

A. That's correct.

Q. So your testimony and your belief is that the State is not -- this state, the State of North Carolina does not have to be concerned with Section 2 of the Voting Rights Act, if using whole counties it cannot create a majority African American district?

A. That's because they are using in two principles.

Q. What makes you say that counties are race neutral **[*309]** principle here in North Carolina?

A. They are political subdivisions. Historical divisions in North Carolina is to keep the counties together.

Q. Are you familiar with various litigation events in North Carolina where the use of whole counties have been struck down? I believe Gingles itself said you couldn't keep counties whole, you can split them?

A. Gingles is about State Senate, State House districts, about multimember districts and I don't dispute that there's a

sufficiently large and geographically concentrated population in certain parts of North Carolina where you can, in fact, meet the first prong of Gingles for State Senate and House districts but you can't for congressional districts.

Q. Isn't it true North Carolina created a number of maps with majority African American districts in the area generally encompassesing District 1 and they have done it by cutting some counties?

A. They have cut some counties. My position is they are not constitutional plans following race and general principles.

* * *

[*311] Q. Dr. Weber, it's not your testimony that it's impossible for North Carolina to have had partisan motivation to create District 12 but still not include every possible Democratic precinct in its borders, is it?

A. No. Because as I responded to Ms. Smiley, there might be some Democratic precincts in say the six counties of the 12th district you couldn't get in there because they are too far afield from the abutting line.

Q. And, in fact, in your opinion, congressional Districts 1 and 12 are already overly safe districts, even without those additional Democratic precincts?

A Yes. Again, in the 1997 Plan, yes.

Q. Dr. Weber, if you -- Dr. Weber, in examining Plan '97, the 1997 Plan, you had testified before, I believe, that there were Democratic precincts in District 12 that you would or could perhaps move to District 8. Do you recall testifying to

that?

A. Yes, I do.

Q. Let me ask you: in order to do that, if you look at the map there, in order to move precincts from Mecklenburg County, for example, or actually if you want to move it from Mecklenburg County to District 8, wouldn't you have to cross Mecklenburg County in order to do that from District 8 or actually --

A. No. If you are going to add a portion of Mecklenburg **[*312]** County to District 8, then you would have to swap some population from District 8 into, say, District 9 or District 12.

Q. Actually, my question was: if you were going to move precincts that are currently in District 12 that are in Mecklenburg County and move those precincts into District 8, wouldn't you have to cut or actually move into or cross Mecklenburg County line?

A. Yes, you would have to do that.

Q. Wouldn't that result in a three way county split, as it is presently configured?

A. Yes.

Q. Looking on Table 7 in your report, which is Exhibit 47?

A. Can you help me with the page number?

Q. Page 80.

A. Thank you.

Q. Do you have it there?

A. Yes, I do.

Q. Now, in this table you are comparing white and African American participation; is that correct?

A. Yes, in the Democratic primary of the Democratic runoff primary.

Q. All right. Now, in North Carolina you are aware that only Democrats and unaffiliated voters can participate in **[*313]** a Democratic primary?

A. That's correct.

Q. So Republicans are not eligible to participate in the Democratic primary?

A. That's correct.

Q. Looking on Table 7, the participation percentages you list there under the African American column, for example?

A. Right.

Q. Those African American percentages are registered voters, almost all of whom are eligible to vote in the Democratic primary?

A. Yes.

Q. And looking at the white percentages, those would be percentages of white registered voters but would include numbers -- voters -- include in those percentages voters that might be republicans and, therefore, ineligible to vote; is that correct?

A. Yes, some.

Q. So, for example, on page seven, the very bottom there, 1998 Congressional District 12 U. S. Congress under white participation?

A. Right.

Q. The .025 number that would be a portion of all white nonproportion of all white voters eligible to participate in the primary?

[*314] A. That is correct.

Q. So this analysis that you lay out in table 12 doesn't give you a comparison of participation between white Democrats

and African American Democrats, does it?

A. That's correct.

Q. As a result, your conclusion regarding participation rates between African Americans and whites, by including Republicans, white Republicans who are not eligible to vote, your results are artificially deflated with regard to white voters and African American participation?

A. If we could, in fact, separate out the white Republican voters from the white Democratic voters, each of the participation estimates would be higher for the white participation rates. They would be not much higher for the first congressional district because they have a high percentage of white Democrats in the First Congressional District who participated in the Democratic primary. You would have a more severe effect in the 12th District.

Q. So these are artificially deflated vis-a-vis African American participation; is that correct?

A. Particularly for District 12.

Q. In your report, which is Exhibit 47 on page 89, paragraph five --

A. Yes.

[*315] Q. -- you mention that African American voters residing in District 1 and 12 in the 1997 Plan do not participate in lower rates than white voters in recent Democratic primary runoff elections, indicating any evidence that history or official discrimination has any lingering effects that would impact voter registration?

A. That's correct.

Q. Looking at the results of your participation analysis, that does not tell us that the lingering effects of past official

discrimination, in fact, no longer exist; is that correct?

A. I believe that is the case. They no longer exist in the state of North Carolina.

Q. But can you base that conclusion upon your analysis of the participation rates that we have outlined in Table Seven?

A. Yes, they are not, if there are lingering effects of discrimination. They are not meaningful for participation. They might be meaningful for other aspects of life in North Carolina, but not meaningful for political participation.

Q. I didn't ask you if they were politically significant or meaningful. Looking at your results from Table Seven. Based on your analysis of the Democratic primaries, you can infer, given your errors, you actually deflated the **[*316]** white participation?

A. I don't believe that I have deflated those numbers significantly, so white participation in the Democratic primary would be higher than African American participation.

Q. But you don't really know, do you?

A. I have a pretty good idea of what percent of the whites in District 12, for example, are Republican and I could -- in fact, with a calculator, I could quickly do that.

Q. Dr. Weber, given the information that you had when you calculated these participation rates, you had no way to factor out by race and by party the number of white Republicans who are stated in that race?

A. No way I could.

Q. You could not?

A. No, analyst can do that.

Q. So I'm correct, you could not do that?

A. Correct.

Q. You could not infer from that information with certainty lingering effects of official discrimination have been removed using the Democratic primary participation analysis you laid out in Table Seven; is that correct?

A. Yes, sir. I disagree with your premise. I believe **[*317]** that based upon any adjustment that I would make of these data, if I could, in fact, accurately estimate white participation rates in the Democratic primary, you would still see African American participation being higher on the average than white participation, whether or not whether we're talking about District 1 or 12.

Q. My question was: you can not, using the analysis you laid on table seven, with certainty testify that the lingering effects of the official discrimination have been removed based upon the analysis you have done in Table Seven?

A. Yes, I believe it is, with certainty.

Q. So the answer to my question is yes, you can, with certainty, based on your analysis, tell this court the lingering effects have been removed?

A. Yes.

Q. Based on your analysis of general elections, you testified there are no party -- where there are no party restrictions and all the white voters are eligible to vote, you concluded that black participation was actually lower; is that correct?

A. Yes, tends to be lower.

Q. And your evidence in the primary is not consistent with that evidence; is that correct, given to errors or given the deflation of white participation; isn't that **[*318]** correct?

A. I didn't understand the question.

Q. Given the deflation of the white participation in the primary election, given that you did not factor out white Republicans, the evidence -- your conclusions from that may not be inconsistent with your conclusions from the general elections; is that correct?

A. I believe they are inconsistent. I believe that white participation is lower in the Democratic primary than African American participation.

Q. But you can not verify that with certainty. You could not factor out white Republican participation in the Democratic primary; is that correct?

A. I know approximately what percentage of District 12 is white Republican. I know what percentage of District 1 is white Republican, and if I do that, I do not believe that I take away the difference. It narrows the difference. It might in one or two elections make the white number slightly higher than the African American number. As a general picture, I don't believe we will always be higher white than African American.

A. In table 9 in your report, Dr. Weber, Exhibit 47, you have estimates of white cross-over rates in North Carolina?

A. Yes.

[*319] Q. And looking at that table, those rates range from a low of 17.9 percent to high of 46.2 percent?

A. Yes.

Q. In table ten you lay out the rates; you analyzed the congressional races?

A. Yes, sir. These are the two elections held in the plan in District 1 and 12 in 1988.

Q. That, though, shows Representative Clayton received 32.4 and Watt received 32.6 percent?

A. That's correct.

Q. As a social scientist, you are familiar with the levels of white cross-over, the Supreme Court analysis found in the gingles case; is that correct? You recall what the ranges are?

A. I remember vaguely. You would have to show me the exhibit to remind me. I remember there was an exhibit in the opinion.

Mr. Cox: May I approach, Your Honor?

Judge Thornburg: Yes.

By Mr. Cox:

Q. Dr. Weber, I've handed you the Gingles opinion and the appendix to that opinion actually lays out the amount of voting support the candidates received in the districts that the Court analyzed in that case. See where I am?

A. Yes.

[*320] Q. Of the Appendix A. Now, looking at that appendix, the levels of white cross-over in the districts which the Supreme Court find both dilution in gingles ranged from 20 percent to a high of 46 percent?

A. Say that again.

Q. The range of white cross-over the Supreme Court found in the districts in which it found vote dilution ranged from a low of 28 percent to high of 46 percent?

A. Are we looking at primary or general?

Q. General elections.

A. From District 36, District 36 there's a white cross-over in 1980 of 28 percent for someone named Maxwell. And I see a 46 percent -- well, I see a 49 percent in District 23 in 1980, Mr. Spaulding.

Q. In District 23, they didn't find dilution?

A. That's correct.

Q. Of the districts when they found dilution, I'm not talking of those districts. That would be Districts 22, 21, 36 and 39?

A. Yes.

Q. And considering that range, those ranges are comparable to the ranges that you found in your analysis for this case in terms of white cross-over, isn't it?

A. Yes.

[This page intentionally left blank.]

[*334] A. Well, I read the opinion in *Shaw versus Hunt*, and the first thing that we needed to do was to cure the constitutional defects in the 1992 Plan. So that was the first consideration. And I think in general that meant making the plan look a lot nicer; and secondly, to make certain that race was not the predominate factor in drawing the districts. And in making the districts look a lot nicer, we needed to make sure we didn't split precincts, try to split fewer counties, make sure you didn't have one county with three members of congress. Making sure you didn't have long narrow corridors where you didn't have any people. Making sure you didn't have the double-cross overs and cross overs and point contiguity and all of these concerns that were pointed out by the court.

Q. Before you go onto the second goal, was there any feeling on your part or the leadership of the Senate not to create and draw a constitutional plan?

A. No. We wanted to make sure that the plan was constitutional.

Q. Would you prefer not to be back in court again?

A. Most definitely.

Q. What was the other one?

A. The other concern was we wanted to make sure that the legislature drew this plan and not the federal courts.

[*335] Q. With all due respect to the federal courts?

A. With all due respect to the federal courts, yes.

Q. But?

A. But we felt it was our responsibility and we didn't want to delegate that authority. We knew we had a real problem

with that and the Senate was majority Democratic and the House majority Republican and we knew if we had a plan that was too partisan one way or the other that you would never get enough votes in the chamber that was getting the short end of the stick.

Q. If I might interrupt you for a moment. In 1996, what occurred with respect to the incumbents, the congressional delegation for North Carolina?

A. With the 1996 election, there were we ended -- up with a delegation of six Democrats and six Republicans after the election.

Q. I'm sorry to interrupt you.

A. We knew that would be important because the bottom line was to make sure we had 26 votes in the Senate and 61 votes in the House to pass the plan and there are many considerations that you have to take under consideration when you try to do that.

Q. And in terms of gaining votes, do you look after the interest of incumbents?

A. That was a consideration and the reason it's a **[*336]** consideration is that incumbents are in office, they have a constituency. They have people who advocate for them in the General Assembly. Oftentimes they have close relations with legislators, and so incumbents can affect votes in the General Assembly.

And although it would be nice to draw these districts in a vaccuum and to make them look nice and to completely ignore partisan politics and completely ignore who's the incumbent, I'd like to find a way to do that. But in order to get votes in the General Assembly, to get a plan passed, you can't

do that and you have to take into consideration what incumbents think about the plan.

Judge Boyle: Let me interrupt for a second. Don't lose your train of thought. As a benchmark, the congressional delegation is now seven, five Republican in the '98 election. In the 1996 election, it was 6/6, even. In the '94 election, it was 8/4 Republican. And in the '92 election, it was 4/8, Republican, Democrat; is that correct?

Ms. Smiley: That's how I recall. Perhaps Senator you may know.

The Witness: That's right.

Judge Boyle: So since redistricting in '91, 2 with the '92 Plan, North Carolina has gone 8/4 Democrat, 8/4 Republican, 6/6 and now 7/5 in the four succeeding **[*337]** congressional elections.

The Witness: Yes, sir.

Judge Boyle: All right.

The Witness: And that's one reason you never can predict. I mean, that's ultimately these elections are up to the people and it's very difficult to predict, although we did spend quite a bit of time looking at election results because we knew that the partisan fairness of the plan would be an overriding factor in trying to get a plan with a majority of votes in both chambers. So we had to pay attention to that, although you can never predict exactly.

By Ms. Smiley:

Q. Well, looking at the partisan balance over this decade that Judge Boyle has just refreshed our recollection with, was 1996, was that a windows opportunity when you did have the redistricting at that time there was a balance?

A. I'm not sure that we could have gotten a plan through the General Assembly had there not been a 6/6 split because eventually we settled on that as a fair proposition. It was a fair proposition to the public. It was fair to the legislators. I think you have a lot of Democrats in the Senate who would have wanted to draw the plan to favor Democrats and Republicans in the House.

[*338] One wanted to draw the plan to favor Republicans and this situation that we had already with the 6/6 split made it a very convenient way to have a plan that was fair in a partisan manner. So Representative McMahan and I decided early on and the leadership of both the House and Senate decided early on we needed to strive toward a plan that was a fair 6/6 partisan split.

Now, what that was, and the definition of that was subject of great debate, but we ended up with a plan that I think was fair.

Q. All right. Now, we were talking about the accommodation of incumbents, and accommodating incumbents also meant votes in the legislature. As a general matter, do you have to look at the interest of legislators?

A. Yes, you do. Legislators live in congressional districts. Many times their constituents have been in a congressional district for a long time. They have certain interests that they want to see a congressional district drawn a certain way, so almost every legislator in the General Assembly has an opinion, particularly in his or her own home area about how a district should be drawn.

Q. And do sometimes the different interests of legislators, incumbents conflict?

A. Sometimes they do.

Q. And do they sometimes conflict with the goal of **[*339]** having a 6/6 split?

A. Yes, they do.

Q. Would they sometimes conflict with having a preplan or constitutional plan?

A. Most definitely, yes.

Q. But you have to garner votes?

A. We had to put all of this together and make sure we met all of the tests that the Court laid out for us.

Q. So you might not be able to do some accommodation if you could not create a plan that would be constitutional?

A. Repeat the question, sorry.

Q. Some accommodation might not be made things that people wanted?

A. Yes.

Q. Because it might make the plan vulnerable?

A. Yes. There were requests made that I thought would have made the plan unconstitutional and we just couldn't do it.

Q. Now, the mechanics of the redistricting process itself, did you yourself manipulate the calculations?

A. I did not. I was not in the room and I would give instructions to a person who normally would do the actual mechanical calculations. And most of the time that was Gerry Cohen.

Q. Were you in the room or often allow him to do his **[*340]** work while you were not there?

A. Often allowed him to do his work while I was not there, just on general instructions, yes.

Q. What were the kind of instructions you would give him or what was your working relationship with Mr. Cohen?

A. Gerry is maybe more familiar with maps and precincts and make up and Democratic performance and Republican performance than anybody in the state. He has been working with this for such a long time. I would give him a general idea of what I wanted to do. I would say move a certain county into a certain district or I would just talk to him conceptually about a problem that a legislator would have and would say we need to do something to try to fix this.

Q. Would he ever come back to you with ways he thought that could be accommodated?

A. Yes, he would.

Q. Did you work with other legislators?

A. Yes, I did.

Q. And did you see a lot of plans?

A. Yes. We saw a lot of plans. Many plans were submitted and people had a lot of different ideas about what we ought to do.

Q. Okay. With respect to other legislators, how did you handle the process of getting their input and making sure **[*341]** that you could get your votes?

A. Well, I talked to individual legislators. I told them that if you have ideas, let me know. I did have legislators that would bring plans into the office. Many times they would draw their own district without thinking about the other 11 districts in the state and that would sometimes cause a problem because everything is inter-related, but we had legislators who would draw their own plans and bring them in we would look at that.

We held a public hearing. We let input in from the public. We had discussions, suggestions from the public on what we ought to do.

Judge Boyle: When you say "legislators," you are talking of members of the General Assembly, not members of congress?

The Witness: But members of congress also gave us their ideas.

Judge Boyle: That's what it sounded like. They would come in with a district of their own, not taking into account other districts?

The Witness: That's correct, but we had plans from other state legislators who had interests in this issue they want present us with plans as well as members of congress.

By Ms. Smiley:

[*342] Q. So he might be interested himself in possibly running for office or he's the incumbent?

A. Yes.

Q. I won't make you elaborate on that. My next question, which Judge Boyle has anticipated, is could you describe as well as you can remember the input that you had in your consultation with congress persons or their aides?

A. I think that I talked to every member of congress or his or her representative except for Congressman Taylor in this process.

Q. And is his district really in play?

A. His district is the 11th, the far west, and we did very little to that district and no, that district really was not -- pretty much everybody agreed that we ought to straighten up the line a little bit to make it look a little nicer but it was not

significantly debated. So I didn't really have occasion to talk to him or any of his staff and he didn't ever contact me. But I did have contact with all of the others, I believe.

Q. And to the extent that you can remember the kind of contact that you had or when in the process?

A. Talked on the telephone, we had one meeting in Raleigh of Democratic members of congress wherein they came to Raleigh and I presented them with some ideas and **[*343]** they presented me with some ideas but most of it was by phone. Some of the members of congress came individually on separate occasions and talked with me.

Many of them, as the judge said, were drawing their own plans and submitting them to me. I think when we had that meeting is when I showed them some of my ideas and so they started working off of that and giving me ideas or suggestions. I think the general idea was many of them wanted to keep a lot of the constituents that they already had because they had a lot of time invested in talking with them and representing them and many of them wanted to do that.

Q. And at that point in time when you started presenting plans or ideas, at least to the delegation, do you remember what the main outline of the plan or what you showed them?

A. It was probably pretty close to what I presented to the Senate committee. I think it was in February sometime.

Q. Before we go there then, let's step back a little. All right. You were talking to legislators and congress people. Did you begin talking with Representative McMahan?

A. Yes.

Q. Could you say when and kind of give us a little **[*344]** history of your discussions with him in the early time before you started negotiating your plans?

A. Very early in the process Representative McMahan and I agreed that we would keep an open dialogue and that we would try to come up with a plan to present to both sides that we both agreed on. So we began discussing principles. We talked about the 6/6 split and wanting to stick to that principle. We talked about making sure that we kept our lines of communication open and we began the process of presenting plans back and forth to each other for each other's consideration.

Q. Was there initial issue based on the plan that the Republicans had presented in the summer of 1996; do you recall where the 12th District was in that plan?

A. Is this the plan that the 12th District ran from Mecklenburg down across the south east to Robeson County?

Q. Yes. And is that an issue you talked with Representative McMahan early on about that?

A. I told him that was just completely unacceptable and that plan would never pass the Democratic Senate.

Q. Was that early in the process?

A. Yes, that was fairly early in the process.

Q. Why?

A. For one thing, probably most importantly, there would be members of the Senate that would think the plan was **[*345]** very much unfair on a partisan basis, because it would have resulted in an 8 to 4 Republican partisan split. And I suspect that was the motivation behind it being presented --

Q. Did it disrupt a good number of Democratic districts in the southern part of the state, south central part of the state?

A. Yes it did.

Q. Okay. So that was one of the early issues you did discuss with Representative McMahan?

A. That's correct.

Q. How did you all resolve that at that time or how did you leave it, when you said that was no go?

A. He pretty much gave up on that pretty early. There were other members of the legislature who wanted to do that for what I believe to be partisan reasons. He understood -- he was being practical, as I was. There were plans out there that would have resulted in a strong Democratic leaning map, and I knew early that this was not going to be a practical solution to the problem so we both understood that and he gave up on that pretty early in the process.

Judge Thornburg: I think this is a good point to break and, Senator, we will start back at 2 o'clock.

(Lunch recess taken.)

[*346] (Witness, Roy Cooper, returns to the witness stand).

Judge Thornburg: You may proceed.

By Ms. Smiley:

Q. Senator, moving farther into the world of redistricting, could you tell us a little bit about the data bases in the computer system and how you used them and, obviously, not a technical answer from you, but --

A. There was data in the computer from 1988 when we had redistricted for 1999 -- excuse me, for the 1990 Census. There was data from election results in 1998 that went into the computer in addition to other demographic information. We

used that same information that was from the 1990 Census for redrawing these maps for 1997. There were election results. I think there was a Lieutenant Governors race, a Supreme Court or Superior Court Judges race and a U.S. Senate race that was from 1988 that was in the computer.

Q. What information did you find most useful in looking at District 12?

A. The election results were the predominate number that we looked at in all of the districts. We even had some supplemental election results that we used, but with this overriding issue concerning 6/6 partisan split, the election results were the most predominate numbers. In fact, when we were using the maps, that was generally the **[*347]** number that was up on the screen.

Q. Do you recall which election you felt gave the best indication of Democratic\Republican?

A. That's difficult to say. Probably that judge's race gave the best generic indication, but still that was older data, that was 1988 data. And although it was somewhat useful, it wasn't the primary election information that we used.

Q. What was the primary?

A. The primary information was election results that we received from an organization called the National Committee for an Effective Congress, which was an organization that I think was primarily funded by the National Democratic Party. It's primary function was to help elect Democratic members of congress across the nation and to specifically help with states that were doing congressional redistricting.

Q. And how would you go about getting that information from them?

A. We had a computer link up with our General Assembly map makers with the committee in Washington and whenever there was a map that we wanted to look at their analysis of the map we would send it up electronically and they would send back information to us, giving us election results and telling us what the Democratic performance of **[*348]** the district would be.

Q. And was that data more current than what you had?

A. Yes, it took into account several elections from 1990 to 1996 and the state computer data base only had the 1988 election results.

Q. And was there a particular column that you used on the NCEC data?

A. There was a column that was an inclusive cumulative performance number that they came up with taking into account all of these elections, and they called it a Democratic performance number. So, for example, if you had a 55 percent Democratic performance, then that would be very good. Below 50 would be of concern.

* * *

[*349] A. Well, the primary concern was to address, as I've testified earlier, the constitutional problems that were cited by the Supreme Court in *Shaw v Hunt*, so that turned us to the 12th Congressional Districts because that specifically was the district that was unconstitutional. The Court had real problems with the long narrow corridors without people, splitting of precincts, point contiguity, crossovers, double-crossovers.

We set out to eliminate all of those problems that they had specifically pointed out in the decision. And **[*350]** also we wanted to make certain that race was not the predominate factor, which is what the Court said that we could not do.

So I began by taking that into account. We also had the practical problem of getting a plan that was passed. So we took the core of all 12 districts, the general area of all 12 districts and began our redistricting process. And I would say that we probably made the most dramatic changes in both the 12th and the 1st Districts from the old map because of the problems that were cited by the Court in *Shaw v Hunt*.

Q. When you talk about the core, what does a core mean to you? Are you talking about the African American core?

A. No. The geographic core, the area the constituents that were in the previous congressional district. If you had started from square one with people who were already in a congressional district with members of congress that already represented areas. If you started at square one, I just don't think we could have drawn a plan that would have passed muster. Even from census to census, most of the time there's a geographic core of the previous district that you start with, so this was really no different than coming from another census, except for the fact that we had the Supreme Court decision that we wanted to address and feel we did address.

[*351] Judge Boyle: Were the changes more substantial in the First and Third than in the 12th, or can you say?

The Witness: I think the 12th was probably as dramatic a change as any that we did. If you look at the map starting in Gastonia with a thin line all the way to Durham, we cut the area of that district almost in half -- excuse me, the length, and

significantly broadened it. So I would say the First and the 12th were the two most dramatic changes. There were some changes to the Third. There were some changes to all of them actually, but I think the First and the 12th were the most dramatic because of the constitutional concerns that were raised by the Supreme Court.

* * *

[*352] A. No, we made dramatic changes to the 12th. We took four, I guess it was four, of the counties that were in it before completely out of it.

Judge Boyle: What was your reason for not taking Guilford out of it as you did later in the '98 Plan?

The Witness: Well, your Honor, when you get back to looking at the partisan nature of what we were trying to do, it was a fact that the 12th District was surrounded by Republican leaning districts. And when you looked at Guilford, it made everyone happy from a political standpoint to take the Democratic leaning voters in Guilford and put them in the 12th because it made the 12th a much stronger Democratic district and it made the Sixth District, Congressman Coble's District, much more Republican, which made him happy.

And in addition, there was a geographic symmetry to putting the Triad altogether and making sure that Greensboro, Winston-Salem, High Point, the Triad, was all [*353] covered by the 12th. That was connected with Mecklenburg and it was, we thought, I think the third shortest district in the whole state and we thought it made geographic sense to do that.

By Ms. Smiley:

Q. If we may back up a little bit. We jumped a little ahead. Had you and Representative McMahan had any discussions and come to any agreement as you were working on the Senate Plan about the 12th?

A. We came to an agreement that it would go from Mecklenburg to a point in the Triad fairly early on, that that's what we wanted to do. All the members of congress were okay with that. We thought it met the constitutional test because we were cutting off large areas that didn't look nice and we knew that that was going to be a Democratic leaning district. So we decided that the only issue was where we went.

Did we go to Forsyth only, did we go to Guilford only, did we go to Forsyth and High Point, did we go to Forsyth, High Point and Greensboro? We came to the conclusion it made sense to connect them altogether and it made sense to keep the Triad together and it made sense from a partisan perspective that made the 12th more strongly Democratic and made the 6th more strongly Republican, making everyone happy. Getting back to my [*354] earlier statement, the people that decide these elections, but we were trying to get a plan that passed and these members of the legislature are looking very carefully at elections and election results, and we were trying to get enough votes to get this plan passed.

Q. Do you recall that at some point there may have only went to High Point?

A. Yes.

Q. At some point you decided to go all the way into Greensboro?

A. Yes.

Q. When that decision was made -- and have you just explained some of the reasons why you made that decision to go to Greensboro?

A. Yes. I mean, it just made sense and it was -- I don't want to be as cavalier as to say "why not," but I mean, it didn't make a whole lot of sense just not -- just to go into Forsyth or just only to go into High Point.

Q. Where could you put those Greensboro Democrats if you don't go --

A. They would natural naturally fall into the 6th District.

Judge Boyle: Is that where they are in the '98 Plan?

The witness: Yes.

* * *

[*356] When you made a decision to go to Greensboro, did you give any instruction to Mr. Cohen or anyone to go to Greensboro and get the blacks or get the black community?

A. No, I did not. I would not have given that type of instruction because that's not the mindset that I had.

Q. And what, in fact, was put into the district, was it just black precincts; if you know?

A. They were mostly Democratic leaning precincts, Democratic voting precincts.

Q. Do you know if most of them were African American?

A. I can not remember and I specifically did not go through and try to remember technically about all of these maps and I can not remember whether there was a majority of African Americans or not. It is obviously a substantial number

of African Americans that were in those strongly Democratic leaning districts.

Q. Were there a majority of white precincts from Greensboro that also went into the district?

[*357] A. There were majority white precincts there also. I can't tell you precisely how many. There were a majority of white precincts, but most are all Democratic leaning precincts.

Q. No point in putting them in if they weren't Democratic leaning?

A. Like I say, we were trying to strike this partisan balance. That's not very pretty, but that's the kind of thing that has to happen to get votes.

Q. When you went to Greensboro and the plan extended to Greensboro, were you attempting in any way to achieve a particular racial percentage in the district?

Mr. Everett: Objection, leading.

Judge Thornburg: Overruled.

A. No, we were not. I would say that the fact that it did, the number did go up, that that was fine with me and that was fine with a lot of people who wanted to support Congressman Watt and wanted to make certain that there was incumbent protection, but that was not the primary motive by far. And we did not have a set percentage that we were looking for because specifically the Court told us not to do that, so we didn't do that.

Q. And as ancillary benefit, do you have any idea whether Congressman Coble was satisfied with what happened to Greensboro?

[*358] A. It is my understanding that he was happy with what we did.

Q. All right.

A. Because it increased the Republican performance of his district.

Q. Now, with respect to District 1, when you were at this point you were working on the Senate Plan, do you recall what some of the issues were and what you were thinking about in the eastern part of the state in the District 1 area?

A. Well, I think all of the issues that I talked about in the 12th would be transferred to the First as well. Although the Court had not specifically overturned the First District, we knew that from the way that the map was drawn and, his Honor showed us, talked about down in southeast, we knew we had to do something about that to avoid a constitutional problem with the First District.

So we looked at the core of the district, which was northeastern North Carolina, and we drew a district that I think complies with all of the issues that we had to deal with. We had to deal with the constitutional issue of making sure that race was not the predominate factor and making sure it looked nice.

But also we had some other evidence presented to us, in the redistricting committee, concerning the Voting **[*359]** Rights Act and the fact that there had been some past patterns of discriminatory voting in northeastern North Carolina, that you had a large concentration of African Americans living in the northeastern part of the state and that we should have a majority/minority district in the First, which we did.

Q. I believe -- excuse me, Senator, Exhibit 125, I believe is a map that shows the African American concentration in that area?

A. Yes, uh-huh.

Q. Now, could you -- what does that map illustrate?

A. I think this illustrates that there are numerous counties in northeastern North Carolina that have a high percentage of African American population and that we simply use that core to create the First District. When we first started doing this, I was a little unsure as to whether we could draw a majority/minority district that met the test in *Shaw v. Hunt* and looked nice, but as we went through the process it became pretty clear that we could draw a nice compact district that made geographic sense, that put together communities of interest, that was a strongly leaning Democratic district, that was slightly majority/minority population.

Q. - I believe you have in your witness notebook an Exhibit 104, which was the plan that the Senate came out **[*360]** with?

A. I believe that's the plan that I initially presented to the Senate.

Q. And ultimately became the plan that the Senate passed and negotiated with the House?

A. Yes.

Q. Okay. And is that District 1 more compact, possibly than the District 1 in the enacted plan?

A. Yeah. I think we did a little better job than the plan we eventually came up with, but so much of the end of the process to do with the Fourth, the Second, and the Third Districts concerning the partisan nature of those districts, that we had to change parts of the First District in order to accommodate those concerns in order to get a plan to pass. So it evolved from what this plan is now to the plan that we ended up with that I don't

think looks quite as nice and compact as this, but I think it's certainly does the job.

Q. Is the District 1, in your Exhibit 104, is that the district that says to you that you can draw a compact African American district and that's why you need to?

A. I would say yes.

* * *

[*362] Q. Briefly, to give the Court a flavor of some of the things you were dealing with.

A. District 2 obviously was a swing district, a hop up district. You just had the election between Congressman **[*363]** Etheridge and Congressman Thunderburk and the parts and nature of that district was of concern to legislators and the public and people were weighing in on that.

Q. And you had a freshman Democratic congressman in that district?

A. Yes, we did. And the same for the Third Congressional District. Congressman Jones represented that district and he was really the only Republican in the east and Representative McMahan, I think, although he never specifically told me what the conversations were going on, I could see from his actions that he was certainly trying to protect the only Republican congressman that was in the eastern part of the state and that came into the negotiations.

* * *

[*364] Q. Did various concerns with 2, 7 and 4 impact on 1, the shape in terms of where 1 --

A. Yes. Any time you dealt with a problem in those districts, since it is adjacent to 1, the First District, oftentimes you had to move some precincts or move a county. So you had to keep an eye on what was happening with 1 because it all works together, it's a chain reaction.

Q. So whatever you might have wanted to do with 1 or 3, you had to look at all the districts?

A. Yes. Because when you move population out of or into a district, you have to go and make it up somewhere else because we're dealing with 552,000 some odd people that we had to draw and these districts had to keep it under a 1,000 people difference. With the ultimate plan, you have to go right down to the person. So keeping population **[*365]** even was always a challenge when you had to go and try to fix one problem, you sometimes would create another problem in fixing a problem that you had.

Q. In ultimately drawing District 1, what consideration was given to race?

A. We felt that it was important to have a majority/minority district. Once we found out that you could draw one that met the test of *Shaw v. Hunt*. So from that standpoint, we did pay attention to race to have a majority/minority district.

Q. Now, in the First District was there any particular percentage that you were looking at and that you were talking about?

A. We wanted to have over -- at some point over 50 percent of the population.

Q. Why was that?

A. Just as I testified to earlier, there is a large concentration of African Americans who live in northeastern North Carolina. We felt that the Voting Rights Act would require if there was evidence that was presented to the committee about past patterns of discrimination and it's just the right thing to do, we could do it easily and draw a nice district, and we did it.

* * *

[*368] A. District 1 is a largely agrarian rural district. It has a lot of medium sized towns. I think uniquely eastern North Carolina you have the 30 to 50,000 population towns with largely rural areas. A lot of those counties are largely poorer counties, they are very high up on our economic tiers of depressed counties, so I think that there's a great community of interest in northeastern North Carolina with those counties that are up there.

* * *

[*369] A. I met with a group of largely African American constituents, Senator Jeannie Lucas, who represents Durham. I met with them and talked with them a great deal and they very much wanted to remain in the 12th. They very much wanted to remain in Congressman Watt's District 6 because they -- they were satisfied with his representation. It was a largely urban district with the same type of issues that urban Durham has. And we talked and looked at the *Shaw v. Hunt* case, and there was just no way the Court would have accepted a move to the

12th going all the way to Durham County. That just would not work.

Q. What about putting it in the First District?

A. It was discussed, but there was just too much disparity of interest there. I don't think that Durham has a lot of interests that are the same as the agrarian rural northeastern counties and I don't think particularly that the group of people, Senator Lucas, people that I was talking to, very much wanted to be in the First District.

In addition, if you went down and got those precincts in Durham County that had been in Congressman Watt's old district, I think maybe you may have run into a constitutional problem with the First District in reaching out that far. And, also, if you did that, that created a partisan problem for the Fourth District.

Q. What was that problem?

[*370] A. That was a district that was leaning Democratic and if you went and took those Democratic votes out of the Fourth District then you had a problem with the Fourth District no longer necessarily being Democratic leaning. So for all of those reasons, we didn't do that.

* * *

[*372] Q. And can you remember right offhand what were the biggest fights that you had to deal with negotiating to your final plan?

A. Probably the biggest fight was the partisan nature of the 2nd and the 3rd. There were lots of other problems that arose, for example, in trying to shore up the 8th District. The idea

was to move east and there were concerns from Congressman McIntyre that he didn't want the 8th District coming too far into Robeson County. The Lumbee Indians were concerned about being removed from the 7th and going back to the 8th or going into the 8th. And those were problems that we had during the process, but those eventually were ironed out.

Q. Were there immediate problems with District 3 when you and Representative McMahan started negotiating?

A. Yes, there were some problems with District 3. They didn't like the way we had drawn District 3. We didn't particularly like the way they had drawn District 3, but I think we ended up more toward their idea of what District 3 ought to be than our plan.

Q. Now, do you recall one of the easily decided the hottest issues when your plan first came out about District 3 had to do with the incumbent?

A. Well, you mean Walter Jones, Congressman Walter Jones, District 3? The House made certain that he has to [*373] be in the 3rd District. His home was in actually the First Congressional District under the '92 Plan and he got elected to the 3rd District anyway, but had received some criticism because he didn't live in the district and that was an important point that Representative McMahan made to me, that they needed to make sure that Congressman Jones resided in the 3rd District.

Judge Boyle: So that incursion that runs in north, west, southeast corridor up into Pitt, to Farmville all is the product of providing a residence for the incumbent?

The Witness: That's how we got there, yes, because his home is somewhere there toward the end of the line. I don't

know specifically where his home is. I just know that was an issue and that was -- that's how we had to get up -- he lives in Farmville.

* * *

[*374] Judge Boyle: So if you had devoted all of Pitt and all of Craven -- not all of Craven, but the contiguous part of Craven to the First, you'd have cohesive, geographically cohesive district, but you wouldn't have the Congressman in the district he represents?

The Witness: That's right, because he lives in the Western part of Pitt County.

Judge Boyle: Right. What was the purpose in taking the 3rd around to Lenoir and Wayne?

The Witness: Well, it's hard to pinpoint any one particular reason as to why you did something, but I think one of my earlier plans had put Wayne in the Second District and the House Republicans and Representative McMahan gotten word -- this was from my talking with him, this is what I gleaned -- that since Congressman Jones represented Wayne in the old district, that he very much [*375] wanted to continue that representation of Wayne, I believe was one of the reasons why that was done. And, you know, it's -- well, go ahead.

It's hard to remember all of the reasons, because there could have been other ancillary reasons why we did what we did because it's always a chain reaction. But that was one of the reasons I specifically recall because one of my earlier plans had put Wayne in the 2nd, and that was a real concern.

* * *

[*378] A. To convince people, we made a dramatic cosmetic change actually and real geographic change in the 12th District and the 1st District. I talk about how we split less counties and how we had not split precincts except for two of them, that we had tied together communities of interest, that we had a plan that was fair, a partisan balance, a 6/6 split, a plan I thought the public would [*379] support and plan that people would have a better knowledge of what district they were in.

Judge Boyle: Do all of those arguments hold true today?

The Witness: For the '97 Plan?

Judge Boyle: Yes, sir.

The Witness: Absolutely. Yes.

Judge Boyle: But the '98 Plan is not geographically compact and you now have the experience of one election under the '98 Plan and none ever run under the '97 Plan, so how do those arguments remain valid?

The Witness: I guess that you can use a compass and a computer to make every district as geographically compact as it can be, but there were many other factors that we considered in this matter. For example if you are looking at the partisan nature of the 12th District, since that's what we mainly dealt with, I think that a Democrat has a much better chance under the '97 Plan than under the '98 Plan.

Judge Boyle: Only as to the 12th District, you make less vulnerable the 5th and 6th and 8th, don't you? So you trade off three districts that conceivably may be "less in play"

under the '97 Plan and make one district the 12th, almost a sure thing?

The Witness: Well, I don't think that under the [*380] way the voting results have been over the past few years that there would be any chance that a Democrat could win in the 6th and in the 5th and in the 10th, regardless of whether it's the '98 or '97 Plan.

Judge Boyle: But there's marginally more chance in the '98 Plan than in the '97 Plan?

* * *

[*381] Q. Okay. There's been some discussion about whether or not in the '97 Plan that the 8th District could be made more Democratic or some Democrats from Mecklenburg County could go down there and use those Democrats in the 8th. Were there certain constraints about the 8th in the 1997 Plan when you were working on it?

A. Well, at the time we were working on this, the 8th was represented by the dean of the North Carolina delegation, Congressman Bill Hefner, who had been there a long time. He had a strong core of support in the legislature in his district. And one of the things -- one of the results of the plan, although I know that the district eventually was won by a Republican, this time by a slight margin, one of the accomplishments of the plan was to significantly improve the Democratic performance of the 8th District from the 1992 Plan to the 1997 Plan. Congressman Hefner had been elected because he was an incumbent and had been there a long time, but his district had increasingly become more Republican leaning and the best way

was to move the district eastward because that's where most of the Democratic voters were. That's what we did, although we didn't move it as far as I wanted to move it. We came into play with Congressman McIntyre, but **[*382]** Congressman Hefner was satisfied. He was moved out of Rowan and he wanted to keep all of Cabarrus because that was his home county and he did not want to go into Mecklenburg. And to get to the Democratic voters in Mecklenburg, you have to go through strong Republican suburban districts, so that was just never considered and was never an option. Now, there was a plan presented --

Judge Boyle: He had to want to get rid of Moore, too, didn't he?

The Witness: Yes, we did that too. We moved to Cumberland. I lost my train of thought.

Oh, Senator Cochrane had presented a plan similar to Representative Morgan's plan that you asked me about earlier, which went from Mecklenburg all the way to Robeson, but, and I talked with Senator Cochrane about that and other Republicans who were pushing the plan, I just told them from the partisan nature of the plan that it just would not. Democrats and the Senate would not do that and it was viewed as a partisan plan, is what it was viewed as and I think that's probably what it was.

Q. Okay. Now, at some point in time, the plan passed and did you have occasion to go and visit with the Department of Justice?

A. Yes.

Q. Now, I don't believe you were here for Mr. Everett's **[*383]** opening speech, but he has alleged in his opening

statement that the state was under the gun to the Department of Justice and their maximization policy and had to draw a black district. In terms of the Department of Justice, had you had any contacts with them when you were drawing the plan?

A. No.

Q. And what was your first contact with them?

A. When I flew to Washington with members of the Attorney General's office and some other people to present the plan to them, that was the first contact I had with the Justice Department.

Q. Was it the last?

A. Yes.

Q. And was it a memorable meeting?

A. No. I mean, I think that they understood the ruling in *Shaw v. Hunt* and there was very little problem with preclearance. I didn't think that that would be a real concern. You never know what Justice is going to do, so we treated it seriously and went up and talked to them about what we had done. And I had mentioned in my deposition numerous times racial fairness was important, and I think the plan was racially fair. That I never thought that that was a serious danger. We were much more concerned with making sure that the plan was **[*384]** constitutional under *Shaw v. Hunt*.

Q. And that it was by partisan?

A. Yes, that was the practical consideration of -- just let me step back a minute. I would very much love to draw these districts in a vaccuum, but you have to get majority votes. In the legislature, partisan considerations come into play, and where people live come into play, and incumbents come into play. And it is very difficult trying to practically and

realistically put together majority votes without taking these things under consideration, and that's what we did. I was given a job to do and I wanted to make sure I did it.

Q. And you were attempting to do it in a lawful manner, I suppose?

A. Yes. And I think we ended up with a plan and this was foremost in my mind to serve the public better and I think this plan does. I think this plan is a plan where people can, in general, know where they vote. It's a fair plan.

* * *

[*386] Q. So -- well, the question was: wasn't it necessary? The question I asked you, and you said, didn't you, I have said that we thought that that was the case that we had to do that. Isn't that the question you were asked?

A. Yes. And we had to do it for a variety of reasons. I would have felt more uncomfortable about going for preclearance had we not had a majority/minority in the 1st District.

Q. You would have felt more uncomfortable?

A. Yes, sir.

Q. And you would have felt it wouldn't be approved?

A. That was a potential. I don't know whether that would be the case, but yes, I thought that would be a potential.

Q. Before you went up to the Department of Justice for this meeting, did you have any discussions with the Attorney General's office about preclearance?

A. Yes.

Q. And weren't you advised at that time that it was very unlikely to be precleared without a majority black district?

A. I don't remember specifically whether that was told to me. I do remember Mr. Stein coming to the [*387] redistricting committee and other attorneys advocating for a majority/minority district and that there could be Voting Rights Act problems if we didn't do that, but you can do it fairly easily and draw geographically compact district. So it was the right thing to do any way. So for all of those reasons, we did it.

Q. And it would have been wrong not to do it?

A. I think it would have been wrong not to do it.

* * *

[*387] Q. Let me ask you this, though: Isn't it true that African American voters, as members of the legislature are very important in the Democratic party political process?

A. All voters and all kinds of people are important in [*388] the Democratic political process, yes.

Q. Isn't it also true approximately 95 percent or even higher of the African Americans of North Carolina who register to voter register as Democrats?

A. That sounds like a figure that is correct. I don't know the figure personally, but is sounds like a figure that is correct.

Q. North Carolina has closed primaries for the Democratic primary?

A. I have been – I believe you can vote in the Democratic party if you are unaffiliated.

Q. You can't vote if you are a Republican or with the Reform party?

A. That's correct.

Q. Under those circumstances, isn't it true that African Americans are a very strong political influence within the Democratic party?

A. I would say that, yes; yes, that's true.

Q. And wasn't it your belief, from what you had heard and seen as a representative and otherwise, that the African American political faction, as it were in North Carolina, is very cohesive, that African Americans are not only Democratic but (unintelligible) in the political process?

A. I wouldn't want to go as far as to say that, but much [*389] less so today than it used to be, I would think.

Q. All right. Wasn't it true, in your view, that African Americans were very anxious to have as many African American members in Congress as possible?

A. There were many African American, yes, who thought it was important to have African American members of Congress representing North Carolina. Yes.

Q. And many of them thought it was important to have two majority black districts back in 1992, correct?

A. Yes.

Q. And didn't many of them think that it was important to have as heavy a minority population, African American population in the constituted 12th District as could possibly be put there?

A. I would say that there would be many African Americans who would advocate that, yes.

* * *

[*395] Q. Before that in the 1991 Plan, District 12 had meandered off to the east somewhere, or do you recall?

A. I really don't recall where 12 was in that first plan.

Q. With respect to '92, '97', '98, would you say that Mecklenburg had been the hub of the 12th District?

A. Hub is probably a good word, yes. How's anchor? Hub or anchor.

Q. Isn't that the word you used in your deposition?

A. I did. That was a good word.

[*396] Q. With respect to the 1992 Plan, were you aware that Mecklenburg company, in particular Charlotte, were split in such a way that most of the black precincts were put in the 12th and most of the white in the surrounding district the 9th?

A. I know there was a lot of attempt to make certain that there was a certain African American percentage in the 12th District during that period of time, so it would make sense that that would be what would have happened.

* * *

[*403] A. I don't think anything is assured. Congressman Watt was an incumbent. We paid attention to all incumbents and, yes, we looked at race. As I testified before, it was important racial fairness, but we did not specifically reach any type of threshold in race in the 12th District.

Q. You say you didn't try to reach any threshold in race. As far as the '97 Plan, the change for the '92 Plan, didn't you

basically try to achieve as close to 50 percent as you could get without getting there?

A. No, we did not have any type of goal. We first looked at trying to cure the constitutional defects and made sure that it was still a strongly leaning Democratic district. I think the fact that it has a relatively high number of African Americans is a fine thing. It was a benefit. It was one of the considerations particularly there were as you've asked me before, there were people who were pushing for a higher percentage, but there was also the consideration of making sure that the Sixth **[*404]** District was more Republican. That was something that Congressman Coble wanted, so all of those factors came into play.

Q. Nevertheless, at the end of the day in 1997, all of the predominately black precincts in Mecklenburg had been in the 1992 Plan were retained in the 1997 Plan; isn't that true?

A. Probably most all of them were, but with the addition of a whole lot more.

Q. And that was because of the deletion of Durham and of this sliver over in Gaston?

A. Because of what the Court told us to do, we had to make sure that this plan looked a whole lot nicer than it did and race didn't predominate.

* * *

[*406] A. We cut off Gaston, we cut off Alamance, we cut off Orange, cut off Durham and took all of those out of the 12 and kept the core, the Triad to Mecklenburg core fattened it,

made it look nicer. Took in a lot more Democratic leaning voters, systems as we could and made it a nicer looking district.

Q. In you take in African Americans, add them, you are taking in always also Democratic leaning voters 95 percent of the time; isn't that true?

A. Yes. African Americans generally are strongly Democratic leaning voters, yes.

* * *

[*408] Q. Now, with respect to the map of the 12th District, I just want to be sure on this. Looking at this map, would you be -- and the map is Joint Exhibit 106. Would you be able to identify for me what might be referred to as the "Greensboro black community"?

A. Only by the fact that you have on this map across here precincts that say 40 to 100 percent black. Because of this map, I can point it to you and say, there, but I could not tell you if you gave me a map without that information on it where that would be.

[*409] Q. You would think that area identified by the cross red or the checker red marks on Exhibit 106, those with 40 to 100 percent concentration would be what's referred to as the Greensboro black community?

A. I don't have a concept of what the Greensboro black community ask. If you are taking into account those precincts that have only 40 percent African American, then you have substantially less than the majority of the African American. This is the first time I have seen this map. I wouldn't be able to say where the Greensboro black community would be.

Q. By the same token, were the High Point black community or Winston-Salem or any of the other communities there?

A. Right.

* * *

[*411] Q. Then, looking at the page referring to e-mail for February 10, 1997, do you see who is addressed from and to whom?

A. It is from Gerry Cohen to me with copies to Leslie Winner.

Judge Vorhees: Copy to whom, please?

The witness: Leslie Winner.

Q. Now, with respect to Gerry Cohen, did you testify previously he was the person who was primarily doing the technical work, the handiwork, as it were, in getting the plans together?

A. Yes.

Q. Had he been assigned to you?

A. Yes.

Q. And Leslie Winner, she was a Senator at the time?

A. Yes.

Q. And no longer is a senator?

A. That's correct.

Q. Do you know whether or not at an earlier time in connection with the 1991 and '92 Plans, enacted by the General Assembly, whether Leslie Winner had been involved?

A. She was an attorney involved in the process. I'm not quite sure whom she represented, but she was an attorney, maybe an advisor to the House.

[*412] Q. She had been representing the General Assembly?

A. I can't say for certain, but she was an attorney involved in redistricting and she had a lot of knowledge about redistricting, yes.

* * *

[*412] Q. Senator, I was asking you about this memo, or e-mail rather, to you from Gerry Cohen. And I believe that's Exhibit 58 in the deposition exhibits. Senator, it's a fairly short e-mail or memo. I was asking about the people involved. I was asking you about Senator Leslie Winner. Is she the same Leslie Winner who's an attorney in Charlotte and now the attorney for the Charlotte Mecklenburg School District?

A. Yes.

Q. And she had experience in the redistricting process?

A. And Gerry Cohen had been the person who had drawn the 1991, 1992 Plan as well?

A. I don't know that personally, but that's something I presume from conversations. I think that's correct.

Q. And from his experience in drawing those plans and otherwise, you discovered that he was quite familiar with [*413] the North Carolina counties, precincts, districts and so forth?

A. That is correct.

Q. Now, there is the last sentence of this e-mail states: I have moved Greensboro black community into the 12th and now need to take about 60,000 out of the 12th.

Do you know what he was referring to when he said he had moved the Greensboro black community?

A. I do not specifically remember even getting this e-mail. And that is not a specific instruction that I would have given to him, but I am presuming that he is talking about moving the part of Greensboro that we had already discussed previously.

He and I at some point had discussed moving the Guilford County area into the 12th and for all of the reasons that I have talked to you about before, making it a stronger Democratic district, connecting the Triad. It made everybody happy.

Obviously, Congressman Coble's district was better, Congressman Watt certainly wanted more of his constituents than he had before and he was certainly happy getting more of those constituents and happy getting a higher percentage of African Americans in his district. And for all of those reasons we decided to go into Guilford County. But I am presuming that this is Mr. Cohen's **[*414]** descriptive term for that part of Guilford County that we eventually moved into the 12th District.

Q. Now, that's the part that we have been -- we looked at earlier the map that was predominately black?

Ms. Smiley: Objection. Form of the question, unless there's a foundation that he knows.

Judge Thornburg: Overruled.

A. You know, I'm a little embarrassed sitting here. I'm not quite sure whether it's majority African American or not, but I

know there's a substantial number of African Americans in that part of Guilford County that we moved to.

* * *

[*422] Q. What, with respect to the cause of balance, did you hear your legislators talking about partisan balance, or was that a concern?

A. Most legislators would want a plan drawn that would be partisan in their party's favor. Partisan balance came about because we had to make sure it passed both chambers, and that became a driving force in the process.

Q. So as far as you could tell, there was no strong feeling when the session began on the part of the legislator individual legislators about maintaining partisan balance?

A. Probably not at that time because they were not thinking about the practical aspects of getting a plan passed. I certainly was and Representative McMahan was. And as the process went forward into 1997, that became a very important issue in my going sure, that we got the plan passed. And it was an issue I think that was good for the public as well.

Q. So in the initial point when they are coming together to begin the session, the legislators would have been more concerned about keeping counties together, not splitting them in redistricting and having minor representation than **[*423]** they would have been about partisan balance?

Ms. Smiley: Object to the form of the question.

Judge Thornburg: Overruled.

A. I think that's very difficult to say. At that point going into the session, partisan balance hadn't become the important

issue that it became once we started negotiating plans. Like I said, that's not the kind of thing that legislators like to talk about publicly. It's not pretty and I don't particularly enjoy sitting here talking about it. But it became a very important issue in the practical problem of getting the plan passed through the legislature.

* * *

[*424] Q. Now, did the issue of minority representation maintain importance as you went through the process?

A. Racial fairness was important to this plan, yes.

Q. Well, by "racial fairness", what do you mean?

A. I believed that we needed to have a majority/minority district in the 1st District, and I think that that went a long way toward racial fairness and that the plan overall was fair to African Americans across the state.

Judge Boyle: Suppose you were in the minority and the opposing party is in the majority and they decided to redistrict and not only went up to 50 percent African American in two districts, but went all the way up to, say, 80 percent. Would that be racial fairness or would that be racial unfairness?

They could make two districts safe beyond belief, but -- and that could be done for partisan reasons, if you follow me. It's a slippery slope you get on when you decide you are going to engage in some use or acknowledgment of race.

[*425] A. Well, that's true, but I did not read the *Shaw v. Hunt* case to say we were doing race.

Judge Boyle: So politics could override race if politics were the true star of your decision?

The Witness: Yes, it could have been, could have.

Judge Boyle: Some party could decide they would put 80 percent minority in a district and thereby deprive their opponents of what would be predictable support in another district?

The Witness: Well, I think it's very, very difficult to draw a district in North Carolina with an extremely high percentage of African Americans under *Shaw v. Hunt*.

Judge Boyle: But you did it in '92 in District 1. All you would have to do would be to hopscotch around to other counties. In the 7th, you could make it more minority/majority than it is now.

The Witness: The Supreme Court told us we couldn't do that.

Judge Boyle: I thought when you went back in '97, you felt like you had to do that in order to pass the Justice Department?

The Witness: No, not with respect to the 12th. With respect to the 1st, we thought that it was important [*426] to have a majority/minority district; that wasn't the overriding factor. If we could not draw a district that looked reasonably geographically compact and met the other criteria, then we would not have drawn a majority/minority district. But it all fit nicely together, so that's why we did it.

Judge Voorhees: Now, you testified that the legislature, in coming up and reviewing various plans over the process of developing the '97 Plan, was mindful of the court decision in the *Shaw* case and Voting Rights Act and the other factors that you have mentioned.

Now, would it be accurate to say that the various members of your committee and of the legislature were cognizant of the percentages of minors who were being placed into the various districts, but particularly the 12th and the 1st?

The Witness: Yes. I mean, that was something that was printed out for every district and yes, everyone would have looked at that figure and some members would have cared more about it than others.

Judge Voorhees: I may have misunderstood you earlier. I thought you said you didn't know what the final percentage was on 12 when the '97 Plan was enacted.

The Witness: I did. I'm sure that I did. Yes, I did.

[*427] Judge Voorhees: If I thought otherwise, I just misunderstood what you said?

The Witness: I think he asked me what percentage of African Americans were in Guilford County that we put into the 12th. I can't remember. I didn't remember that particular figure.

Judge Voorhees: I think the question had to do with whether you were trying -- that the relevant powers in the legislature were trying to keep the number just under 50 percent?

The Witness: No, that was not.

Judge Voorhees: You say you weren't trying to do that?

The Witness: No.

Judge Voorhees: In so saying, you are not saying the legislature was not aware of the plans discussed?

The Witness: We did know, absolutely we knew a lot of people I think were happier the African American percentage

went up as a result of Guilford County being moved into the 12th.

Judge Voorhees: Was there a viable motive within the legislature to keep it just below 50?

The Witness: No.

Judge Voorhees: The final percentage was sheer [*428] happenstance?

The Witness: Absolutely. I mean, if you were trying to do that, then you would be running afoul of what the Court told us to do and that's just not what we did.

Judge Voorhees: All right.

By Mr. Everett:

Q. In one of your statements I think made on March 25, 1997, to the meeting of the House Committee on Congressional Redistricting you said, as I recall, see if this sounds right: I think overall it provides for a fair geographical, racial and partisan balance throughout the state of North Carolina. Does that sound right what you said?

A. Yes.

* * *

[*429] Q. I'm reading what purports to be a copy of a statement you made to the March 25, 1997, meeting of the House committee. I think that overall it provides for a fair geographical, racial and partisan balance throughout the State of North Carolina. Now, what were you referring to? Was that the plan that you were referring to?

A. I would assume that that's what I was referring to. I said many times I thought the plan was racially fair and --

Q. Racially fair. What do you mean by "racial balance"?

A. I don't know. I don't know what particular context I was making.

Q. Well, let me ask you this: Do you know what you mean by "partisan balance"?

A. Yes, sir.

Q. What does that mean?

[*430] A. Keeping the 6/6 split.

Q. All right. When you use the term "racial balance," wouldn't it follow that you were referring to maintaining a 10 to 2 racial balance between Whites and African Americans in congressional delegation?

A. No. I think I testified in the deposition and the testimony earlier that African Americans would have a fair shot to win both the First and the 12th Districts, and I think that's racially fair.

Your Honor was asking me, I think you had gotten the impression that we didn't pay any attention to race, but we did pay attention to race. That was one of the factors that was considered. But it was certainly not the predominate factor. I talked about why all the different reasons, why we did the Mecklenburg to the Triad District and certainly the fact that an African American has a fair shot at winning that district is part of racial fairness and I have testified to that.

Q. I want to ask you more about what you mean by "fair shot." With respect to the earlier testimony you gave and testimony you gave at the deposition, didn't you say that you were -- you had to have a majority black First District?

A. For a lot of reasons I thought that was a very important thing to do.

[*431] Q. And I asked you whether it was necessary to have it?

A. I don't know whether it was necessary or not. I think probably it was important for three reasons. It was numerous reasons, but, one, I think trying to get votes into the General Assembly. I think we would have lost a lot of votes if we had not done that. Secondly, we may have run afoul of the Voting Rights Act if we had not done that. So all of those things together were important. I thought we had a lot of interest that we needed to make sure to keeping the agrarian core all of that was important in dealing with the First.

Q. You might have run afoul on preclearance with the Department of Justice under Section 5?

A. We may have.

Q. When you say something "had to be", doesn't that mean that's a predominate motive?

A. Well, I think that it needed to be and should have been for many reasons, and I have given you those reasons. It being the right thing to do. Needing the votes, past history of discrimination, voting patterns, potential Voting Rights Act, violations, preclearance, all of those things added up. This is something we ought to do, so we did it.

Q. You should -- when you say you "had to", doesn't that mean it was mandatory and that was predominant?

[*432] A. I don't know what your question means about who was making it mandatory. All of those things told us that we needed to do it, so we did it.

Q. I believe you earlier testified that you thought it had to be done?

Ms. Smiley: Asked and answered, your Honor.

A. To get the plan passed, because it's the right thing to do, because it may run afoul of the Voting Rights Act. If we don't -- you can draw a nice compact district by doing it. All of those things add up.

Q. But didn't you say that having a majority black First District was something that had -- you said was not to be compromised? Did you -- didn't you say that?

A. I don't remember that exact language, but I think it -- I would agree with that. Yes, I think it was important.

Q. So, basically, as you viewed the legislature had no choice but to create --

A. Of course we had a choice, we could have not done it.

Q. You would have been close?

A. Probably close to that.

Q. Wasn't it your testimony if you would have any plan at all you would have to have a majority black district?

A. That was very important. I'm not going to sit here and testify that we just simply would not have passed the [*433] plan if that had not been the case, but it's close to that. It was very important for all the reasons that I said.

* * *

[*434] A. It's likely.

Q. All right. With respect to the 12th District, I'll ask you the same question: Would you think it was highly likely that an African American would be the Democratic nominee?

A. I think it would be likely.

Q. Would it be likely in each of those districts the Democratic African American Democratic nominee would then be elected?

A. I think it's likely.

Judge Boyle: This is all pure speculation. We live in a democracy. Anybody can run. If you chose to run in the 12th District, you have widespread support around, everybody got behind you, you are a white male and you could easily be the nominee and win.

The Witness: He asked me earlier saying there was no doubt. Yes, there's doubt. There's doubt.

Judge Boyle: Who's to say?

The witness: He asked me the question.

Judge Boyle: Yes, I understand. I'm critical of the question.

By Mr. Everett:

Q. You gave us your opinion on likelihood. I was asking you about it.

A. You mean by personal opinion as to likelihood, but, [*435] you know, it's far from a sure thing, but it's likely – more likely than not.

* * *

[*436] Q. I'm going to ask you if indeed there are 60,000 African Americans in Greensboro and the precincts are in the 12th District. Do you have any interpretation of the sentence as to "now need to take about 60,000 out of the 12th" in the e-mail which was directed to you?

Ms. Smiley: Object to speculation.

[*437] Judge Thornburg: Overruled, if he knows.

A. I don't know everything that -- I don't specifically remember this e-mail for one thing; and secondly, I don't know all the other things going on at the time. But I would presume -- and I know I'm not supposed to presume, but I presume the 60,000 we're talking about is total population of needing. If he went to Greensboro and put an area in Greensboro into the 12th that now he needed to take 60,000 people out of the 12th in order to make the population correct. That's what I presume.

Q. Wouldn't you also presume that the Greensboro black community approximated 60,000 when you read that?

A. No, I would not. We certainly don't believe they were all African Americans in Guilford County that were put into the district. We looked at the Democratic leaning districts in Guilford County, and for all the reasons I stated, we put them in the 12th.

* * *

[*438] Q. Let me ask you about earlier provisions, statements in this e-mail where it begins by stating: by shifting areas in Beaufort, Pitt, Craven Counties, I was able to boost the minority percentage in the 1st District from 48.1 percent to 49.25 percent. The District was only as the white percentage was 49.67 percent.

Do you recall a change in the plans that were being prepared by Mr. Cohen, under your general direction, which achieved such a boost in the minority percentage?

A. I don't remember this e-mail specifically and I do not remember these specific instructions about counties and

precincts, but I do know when we were dealing with the 2nd and the 3rd and all of those things that go in between, that sometimes because it's beside the 1st, sometimes we would drop below or just below [*439] majority/minority and we would have to do things from time to time to have a majority/minority, but not radical types of moves. This e-mail, obviously, I don't remember it specifically, but reading it now had to do with that issue of African Americans and what percentage. You know, it could be that Gerry was just had that on his mind and used in that last sentence, used black community and Greensboro as a descriptive term. I don't know, that's not something that I would have instructed him to do.

Q. Now, the next sentence: This was all the district could be improved by switching between the 1st and 3rd. And then reading further down, as to improvement, isn't it pretty clear that Mr. Cohen viewed it as an improvement to increase the African American percentage?

A. I don't know what he was thinking, but, I mean, it's pretty clear that at this point we were in one of those times where we were trying to make sure that the district had majority/minority and he was probably operating under some other parameters in the 1st that he couldn't move for some reason or another, and I don't know what stage of the process this was.

Q. Isn't it pretty clear, Senator, that he was informing you that he believed at least he was improving the district, he was informing you and Senator Leslie Winner that he was improving the district by switching precincts [*440] and increasing the African American percentage?

A. I don't remember this specifically of the ones again, but probably we were in one of those situations where we had moved something in the First District dropped a little below 50 percent and we were getting it back up again, and that's what he meant by improvement, but I don't remember specifically.

Q. And that would be in line with your belief that you had to have over 50 percent?

A. Yes, sir.

Q. And you were getting there one way or the other and he was looking at all the options?

A. Not one way or the other, we had to get there making sure we had a compact district that looked good, that complied with *Shaw v. Hunt* and took into account all the other considerations I testified to here today.

* * *

[*441] Q. So you gave this statement to the Senate and wouldn't it be inferred from that statement that *Shaw v. Hunt* was [*442] inapplicable as long as you didn't get to 50 percent?

A. Let me tell you why I made that statement. It had not really occurred to me until this final plan had been prepared, that this was an argument for constitutionality that it wasn't a majority/minority district.

In fact, Mr. Everett, you were over in the General Assembly and you came to see me and several other people and were telling people this was an unconstitutional plan. And a lot of people have a lot of respect for you, including me, and there were people who began to ask me questions about the constitutionality of the plan. And in all of the other reasons

that I gave I think were good arguments for the constitutionality, but this was an argument that came to mind said, wait a minute, where should the Court start looking at this issue as to when a district is predominately racial? And it became clear, made common sense to argue at least the process for the sake of argument that the test should not even be triggered if you don't have a majority/minority.

I didn't start out this process by trying to get it just under majority/minority for that reason. That was an idea and an argument that came to me later on in the process and I consulted with the Attorney General's office. They said that's a good argument to make, and I made it.

[This page intentionally left blank.]

[This page intentionally left blank.]

[*462] ***W. Edwin McMahan***, **being first duly sworn, testified as follows during *cross examination*:**

By Mr. Everett:

Q. Representative McMahan, I just want to ask you a few questions. You, of course, are Representative McMahan as identified in the deposition.

With respect to the formulation of the 1997 Plan and its boundaries, to the extent there was a difference in participation in the origin of the plan, was it your **[*463]** recollection that the final details of that emerged more from the Senate committee or from your committee?

A. My recollection is that it actually came probably more from the chairs of the two committees negotiating individually.

Q. All right. And with respect to your deposition, at the time you had rather limited recollection of some of the events, as I recall, are there any of the answers -- have you reread your deposition in preparation for the appearance today?

A. Yes, sir, I have.

Q. Is there anything in the deposition that you did at the time of the deposition you did not recall that you now recall more fully?

A. Having read the deposition and some of the answers that -- well, actually, no I think the deposition is a fair representation of what I intended to say.

Q. And at what point, with respect to the 1st District in the plan at the time, you indicated that in its formulation race was a predominate factor -- well, was a huge factor, as I believe you stated. Is that still your recollection?

A. District 1, no question is because of the makeup of the House on our side and the number of minorities that we had to deal with on the House side. Certainly, when we **[*464]** looked at District 1, race was a factor and we determined early on that we could draw that district and make it more compact and geographically compact and also address the race issue.

Q. But was it your belief that it was necessary to have a majority/minority district in order to obtain preclearance?

A. Yes, sir, one district, yes sir.

Q. And that was the one in the northeast?

A. That's correct, sir.

Q. So in your instructions to Mr. Jones, who was your resident, did you inform him of this particular determination?

A. Again, we looked at one, it was never really a big issue as far as whether it would be a majority/minority district because what we were doing is primarily looking at it to make it more compact. And it certainly, from the very beginning, as Linwood Jones drew the map and we talked with the Senator and looked at it, it could be done, the majority/minority,as well as geographically compact.

Q. Now, was it then your testimony that the objective, the purpose of having a majority, black majority African American district in the northeast was a purpose that you were not going to compromise. You were going to get there **[*465]** one way or the other?

A. Well, it was one of the factors certainly that we needed to address.

Q. And did you have a belief from what you had been informed that without that particular district it would not be --

the plan would not be precleared if that were not a majority black district?

A. I certainly recall that we felt, in order to get preclearance, it would need to be a majority/minority district.

Q. Finally did you develop alternatives which you felt were more compact than those that were finally adopted for a majority district?

A. Would you repeat the question?

Q. In other words, in your planning, did you perceive ways of getting to a majority black district that were more compact than those that were in the plan that was more final adopted?

A. We were dealing with a situation where we needed to satisfy a lot of people to get the plan approved. So even though we might have been able to draw it more compact, it was other factors that led to us drawing it the way we did.

Mr. Everett: I have no further questions.

Judge Boyle: Was it your understanding, as you **[*466]** approached redistricting in 1997, that the 1st District, as composed in the '92 Plan, was facially in violation of the Constitution?

The Witness: No, sir, we did not look at District 1 as being in violation of the Constitution.

Judge Boyle: How about District 12?

The Witness: We knew that the three judge panel had ruled it to be in violation of the Constitution in District 12.

Judge Boyle: No, they hadn't, the Supreme Court had.

The Witness: I'm sorry.

Judge Boyle: So the U.S. Supreme Court told you District 12 violated the Equal Protection Clause and you could not continue to use that?

The Witness: That's correct, sir.

Judge Boyle: That's why you were in the redistricting exercise in '97?

The Witness: Yes, sir.

Judge Boyle: But as to District 1, without the Supreme Court directly speaking to that, was it the sense and understanding of the House that that district was likewise in violation of the U.S. Constitution as composed?

The Witness: Sir, as I think I said in my **[*467]** deposition, when I looked at District 1, having known the ruling on District 12, in my mind as a layman and not an attorney, it certainly appeared to me that we did need to make some changes in District 1 the way it had been drawn in 1992.

Judge Boyle: Does that mean there was a recognition you could not repromulgate District 1 in its then existing form? Do you want me to say it again?

The Witness: Please.

Judge Boyle: Was there the sense or the understanding of the House that you would not be able to effectively or constitutionally repromulgate, readopt, District 1 in the same form as it existed in the '92 Plan?

The Witness: Well, again, we felt it was our responsibility to look at the map and where we could make changes and make fewer counties divided, no precincts hopefully divided, which certainly included District 1. Because of the way it was drawn, it went all the way across the eastern part of the State. We felt it was our responsibility to make changes, yes, sir.

Judge Boyle: Thank you.

Judge Thornburg: Your concern at that point was primarily compactness as opposed to racial matters?

The Witness: Yes, sir. The biggest concern we had, when Senator Cooper and I first sat down and talked **[*468]** about it was, of course, maintaining the balance. The 6/6 balance was very, very important as well as geographic compactness, because at that time there were like 80 counties divided and a number of precincts, maybe 80 precincts were divided, but a lot of division there we felt like we needed to correct.

Judge Thornburg: Thank you.

Mr. Everett: May I ask a couple follow up questions to Judge Boyle, so there's no misunderstanding?

Judge Thornburg: Yes, sir.

By Mr. Everett:

Q. I'm trying to find -- here is the 1992 Plan and up here is the First District. You are not a lawyer?

A. (Witness nods head.)

Q. You were dealing with Mr. Cooper, who was a lawyer; you had Mr. Linwood Jones, who was a lawyer. I'm going to put it to you simply with respect to the 1st District in the 1992 Plan, which extended from the Virginia border almost down to South Carolina. Didn't you, on the basis of what you were told when you became chair of that committee, believe that that was an unconstitutional district?

Ms. Smiley: Object, asking him for legal opinion, your Honor.

Judge Thornburg: Overruled.

[*469] A. Judge Everett, again, I could look at that district, and knowing the problems with District 12, that we needed to

also try to see if we could make it more geographically compact. That's what we tried to do. We could do both, you know, make it more compact as well as satisfy the requirements on racial fairness.

Q. I hate to pressure you for a yes or no answer, but are you able to give a yes or no answer to whether you thought it was unconstitutional at that time?

A. I certainly felt that it needed to be redrawn. Whether it was because it was unconstitutional or because you could look at it and tell it needed to be redrawn, I'm not sure, Judge Everett.

Q. You are saying you are not sure whether you had belief one way or the other?

A. No, sir, I'm not.

Q. Let me ask you this: with respect to this district, which had been held unconstitutional by the Supreme Court, was it your belief that you could reconstitute this District without being subject to any issue as to constitutionality if you got the percentage of African Americans below 50 percent?

A. Judge Everett, the percentage was not the fact that we considered. It was primarily the fact that we felt the reason it was unconstitutional was because, again, the way **[*470]** it was drawn and so even though, you know, the racial fairness entered into it, it was not one -- it was one of a number of factors. I think geographic compactness was more important, we felt, than the racial percentage.

Q. Let me ask you this, then: when you got ready to present the plan to the House, didn't you, in fact, tell them that a reason for allowing or having the new plan, which I believe is right here, the reason for allowing it was that it was below 50

percent African American and, therefore, the shape didn't matter?

A. Judge Everett, I was asked that in my deposition. I went back and read the minutes. I did say that on the floor as one of the factors. I'm not an attorney. I didn't mean to interpret that to mean it's now constitutionally correct. I quite honestly, you know, Senator Cooper made that statement and I had picked up on that and that was the reason that I actually made that statement.

Q. So on the basis of what Senator Cooper told you or statement that he had made, and in trying to persuade the House members to adopt the plan, you so informed them with respect to the 12th District in the 1997 Plan?

A. As far as the racial percentage?

Q. Yes.

A. I think the question was asked, what was the racial **[*471]** percentage? I can assure you, though, that was not the primary objective that we had in drawing 12, was to try to maintain a certain percentage of minorities.

Q. Didn't you specifically say that you had gotten it up to 46 percent or above 46 percent? Didn't you tell the members of the House that you had done the best you could in order to satisfy the Department of Justice and satisfy the courts?

A. Well, again, racial fairness was an issue and I had to deal with the House that had 18 minor members, so it was certainly an issue and people had asked the question of where the percentage was, but, again, our first attempt, I think was like 40 percent. We were trying to make it as Republican as possible and make it fair for Republicans to have a chance, but,

again, it was not the main issue, the percentage, but I did answer the question that it was 46 percent.

Q. So it went up to 40 percent where you proposed to have it up to 46 percent and that was at persistence of the Democrats?

A. The Senate Plan was 46 percent.

Q. Insofar as the members of the House were concerned, African members, were they in favor, as expressed to you, as having the higher percentage of African Americans in the 12th District as possible?

[*472] A. Yes, sir, they were.

Q. And with respect to the 1st District, was that the same?

A. Yes, sir.

Q. And they were a very significant force in the House at that time?

A. They were certainly a force that I had to deal with along with a lot of other factors.

Q. And the partisan breakdown of the House at that time was 61/59?

A. Yes, sir, that's correct.

Mr. Everett: Thank you, your Honors.

Judge Voorhees: Now, you said that you felt the 1st District needed to be redrawn from the '92 Plan and that you weren't sure whether that was because of constitutional concern or because it just needed to have more compact shape?

The Witness: Yes, sir. We, of course, did not get any kind of ruling on One, but it was only a 12. But when we looked at the map again, we were trying to look at the map overall, primarily to address 12, but that affected the other districts. And when I looked at one, it was felt by Senator

Cooper and myself it did need to be looked at and redrawn because of the way it was configured.

[*473] Judge Voorhees: The reason for that is the Supreme Court sent a concern about shape?

The Witness: Yes, sir.

Judge Voorhees: So whether it was a fundamental concern or specific concern that the Supreme Court voiced about shape, that's still the reason why you felt it had to be reconfigured?

The Witness: Again, I'm not an attorney; that's my interpretation.

Judge Voorhees: Would that have been the sense of your colleagues, as far as you could tell?

The Witness: Yes, sir, I believe so.

Judge Thornburg: Are there any questions by defense that aren't covered in the deposition and the affidavit or by way of explanation of what's been asked here this morning?

Ms. Harrell: We would like to ask a few, your Honor. If I may approach the witness and give him a notebooks? He's not going to use most of them. This was prepared way in advance.

Judge Thornburg: All right.

Redirect Examination

By Ms. Harrell:

Q. Representative McMahan, you referred to your plan a few moments ago. Were you speaking about the plan that [*474] you presented to the House committee?

A. Yes, sir -- yes, ma'am.

Q. And could you look at the Joint Exhibit 105, Representative McMahan?

A. Okay.

Q. And is that labeled House Selecting '97 Congressional Plan 8.1?

A. Yes, it is.

Q. And is that the plan that you were speaking about that you presented to the House committee?

A. Ms. Harrell, I believe so. You know, when you look at these maps, it takes a little bit of time to make sure, but I believe that's it. I do recall it was labeled 8.1.

Q. All right. And did you refer to the percentage of minorities in your Senate District 12 in your House Plan?

A. As I recall, it was 40 percent having read the information in the minutes of the meetings.

Q. All right. And were you trying to make the Senate 12th District in your plan more competitive or less competitive for Republicans?

A. We were trying, obviously, to make it more competitive for Republicans.

Q. And when you became Chairman of the House Congressional Redistricting Committee, did you meet early on with Senator Cooper?

[*475] A. Yes, we did.

Q. And based on your understanding with your meeting with Senator Cooper, what were your overall goals in trying to steer this plan through the committee?

A. Again, he and I sat down and talked about what we thought was necessary in order to get this approved. I don't think very few people in the legislature felt that we could do it, that we could get the bodies together because, of course, the House was Republican and the Senate was Democratic. So we

sat down and said let's try to see what's important to you and important to me and see if we can bring it together.

Several of the factors, the primary factors, of course, he and I both agreed on was maintaining the 6/6 balance, which currently existed in the congressional delegation. And we needed to make sure we did that. We wanted to try to look at geographic compactness and divide as few counties and no precincts, if it was possible. It ended up we did a good job on that. We talked about racial fairness. We knew we would have to address to that. On the House side, certainly had a substantial number of minorities I would have to deal with and talk to and we wanted to be fair.

So geographic compactness and, of course, the incumbency issue. We were -- obviously knew that, you [*476] know, that it was probably important to try to protect as many of the incumbents as we could. So those were the overall, I think the majority of the issues that we agreed that would have to be addressed.

Q. Just briefly, what was the district that you were concerned about in the negotiations?

A. The one we spent the most time on, as it turned out, would be 2 and 4, and then 3 was important, too, because those were the districts that the numbers were very close on. And we were trying to make sure, again, to maintain this 6/6 balance. So 3, 2 and 4 got more attention, as it turned out, than any of the others.

Q. Okay. And are 2 and 4 both held by Democratic incumbents?

A. Yes, they are.

Q. What were you trying to do with regard to those districts?

A. Well, we -- 3 actually is -- the numbers indicated it's Democratic even though it's held by a Republican, so the Senate was trying to make 3 as Democratic as possible; I was trying to make 2 as Republican as possible.

Q. Okay. And if I could ask you to look also at Joint Exhibit No. 134. You have one of those in your notebook, Representative McMahan, Exhibit 134. And that's the labeled House '97 Congressional Plan A. You have that [*477] before you?

A. Yes.

Q. Is this a plan before you considered your A-1 to the House Committee?

A. Yes. This was, I think, the first plan that Linwood Jones and I redrew.

Q. And with regard to trying to work with minority members of the House, were you able to persuade them to support your bill?

A. As it turned out, the majority of them voted against it on the House side.

Q. And overall, would you say that you were able to accomplish the goals that you started out with regard to the redistricting process?

A. Yes, I was very pleased that we were able and I think actually Senator Cooper was surprised that we were able to get it approved with the numbers we did on the House side.

Judge Voorhees: What were the numbers, do you recall?

The Witness: Sir, I believe we had 85 positive votes, as I recall. I know it was 55 Republicans, I believe, that voted for it on our side, but I believe like 85.

By Ms. Harrell:

Q. And did you feel like the basic objectives that you [*478] started out with were met in the plan?

A. Yes, ma'am, I do.

Judge Thornburg: Did you say a majority of the minority members of the House voted against?

The Witness: Yes, sir, they did, which actually was a surprise, because I tried to work with them as we went along, but they offered a number of amendments on the floor because they were disturbed. They didn't think District 12 was strong enough, you know, the minority, they didn't have enough influence in District 12. So they offered amendments on the floor to actually put it back more like it existed on the '92 Plan, but we were able to defeat those amendments.

Judge Boyle: Were they trying to add Durham back to it?

The Witness: I believe Representative Michaux brought it back to Durham, I believe so.

Judge Boyle: They didn't care about losing Gastonia.

The Witness: I think that's correct.

Mr. Everett: May I ask one or two other questions? I'll be brief.

Judge Thornburg: All right, sir.

Recross Examination

By Mr. Everett:

[*479] Q. The questions were asked of you by Ms. Harrell about the area of dispute, major controversy that was over around 2 and 4?

A. Yes, sir.

Q. So then would it be correct that 12, the idea of 12 was 46 percent, or thereabouts, was accepted as a starting point not to be compromised. You are not going to compromise that part; the big dispute was to 2 and 4?

Ms. Smiley: Objection.

Judge Thornburg: Overruled.

A. The percentage was not -- we didn't discuss, Senator Cooper and I, the actual percentage that needed to be.

Q. Whatever it was, this was sort of a starting point to have this district with whatever the percentage of African Americans was?

A. Well, again, what we tried to do was look at it from the geographic compactness to make it acceptable in the fact of not making it any longer from one end to the other than other districts were. And, again, the actual percentage came out at the end because people asked for it, but it was not what Senator Cooper and I discussed as one of the criterias.

Q. I wanted to be sure I understand then. You are saying this 12th District, as shown here, is now geographically compact?

[*483] Q. Would you please identify yourself?

A. Yes. My name is David West Peterson.

Q. And could you just give a very brief summary of your [*484] qualifications and background?

A. Yes. I'm President of PRI associates, a statistical consulting and software development firm in Durham, North Carolina; recently retired as a faculty member from Duke more than 20 years. I taught first in the business school, later on in the law school and later yet in the statistics department. My area of specialty is statistics. I'm coauthor of a book titled *Use of Statistics in Equal Employment Opportunity Litigation* and co-author of a law review article on the subject of judging science and extended review of a book published by the Federal Judiciary Center. It was published in Washington in the use of scientific evidence in court.

I'm an occasional speaker at seminars for attorneys sponsored by the American Bar Association and other organizations. I'm a member of the faculty of a seminar put on annually at Duke University on the subject of judging science. The clientele there are not practicing attorneys, but judges.

Q. Could you elaborate what you are teaching the judges?

A. Basically, what we're trying to do is teach them the difference between good science and what might be called nonscience.

Q. What portion of that program were you responsible for?

[*485] A. I'm responsible for the initial portion where we talk about what ideal scientific study is and compare it with a study

which is far from ideal and point out what the differences are and why one is probative and the other is not.

Q. And what kind of judges attend this seminar?

A. Mostly state level judges, but we draw judges from all across the country. We draw an occasional federal district judge and an occasional federal circuit judge. Chief Justice Henry Frey of the North Carolina Supreme Court is one of our recent graduates and we recently took the show on the road, so to speak, down to Florida and put on the program there for the State Appellate Court judges, including several from the State Supreme Court.

Q. And attached to your second affidavit, which is Exhibit 20, is there a full resume and list of your articles and publications and background?

A. Yes.

Q. All right. Dr. Peterson, briefly, just what was your assignment?

A. My assignment in this case was to see to what extent there was statistical evidence in support of the proposition that race was the predominate factor in the drawing of the boundary of the 12th District.

Q. What was your analysis?

[*486] A. It was based on the following line of thought. If the boundary of the 12th District were drawn with the purpose of collecting blacks inside of it, one would expect as one travels along the boundary to find consistently that blacks are more heavily represented inside the boundary than outside. In contrast, if the boundary were drawn with the purpose of collecting Democrats into the 12th District, one would expect as one travels along the boundary to find consistently that

Democrats are more heavily represented inside the boundary than outside.

The situation can be likened to that of a contour line on a contour map. A contour line is drawn for the purpose of providing one with a level path. As one walks along a contour line, one has neither to climb nor descend consistently on one side of the line. The land is higher than it is on the other side.

We might suppose that we're given a boundary down on the map such as the boundary of the 12th District and ask to determine empirically whether it's a contour line. One test of that would be to travel along the line and see whether consistently the land is higher on one side of the line than it is on the other.

And if it turns out that that turns out to be the case, that's evidence in support of the proposition that **[*487]** the purpose for drawing the line was to make it a contour line. Likewise, if the purpose for drawing the line was to collect blacks into the 12th District, one would expect that walking along the line one would see a consistent pattern in which blacks were more heavily represented inside than outside. Likewise, if the purpose for drawing the line was to collect Democrats within the 12th District, traverse of the line should reveal that most of the time Democrats are represented more heavily inside than out.

What I found in my study traversing the boundary of the 12th District is that most of the time blacks are represented more heavily inside the line than out, about 80 percent of the time. I also found that Democrats are represented more heavily inside than out, also about 80 percent of the time. And so the evidence is equally supportive of both hypothesis, that is to say

the two are statistically indistinguishable. In particular, neither one dominates the other.

It is true that the party affiliation association is slightly stronger than the racial affiliation association, but it is not significantly, that is to say statistically significantly stronger. I can not conclude that the party -- that the evidence in favor of the party theory is statistically significantly stronger than it is in favor **[*488]** of the race theory.

Q. Would the converse hold for the race theory?

A. That's right. Neither race nor party dominates statistically.

Q. Okay. Could you briefly tell the Court, in very summary form, perhaps using some of your exhibits, what your analyses were?

A. Sure. I have described what I characterize as my main study and maybe the exhibit that best exemplifies the conclusions not only of that study but also of a couple of other studies that I did is an Exhibit numbered 428, which consists of a collection of pie charts.

Q. If you will allow the Judges a moment.

A. Sure. And I point particularly to Chart Number 8 in that collection.

Q. The full details of this one are in your first, second and third affidavit?

A. That's right, primarily the first. The chart that we're looking for is the one that looks like this, Chart Number 8.

Q. Exhibit 428?

A. In Exhibit 428. And this is a collection of 12 pie charts that summarize 12 variations on the second of three studies that

I did. But the results that were apparent here typify the results of all of the studies that I have **[*489]** done.

In interpreting a pie chart here, the more heavily the darker portion of each pie represents the strength of evidence in support of the race hypothesis, the hypothesis that race was an important factor in the drawing of the predominate boundary of the 12th District. The light gray areas indicates the strength of statistical report for party affiliation. That party affiliation was an important factor in drawing the boundary.

In looking across these charts, there's a pretty even split. The support for the one hypothesis, about as strong as the support for the other that's in all of my studies. If you get in and count closely, you will see that support is slightly stronger in favor of the party hypothesis overall than it is for the race hypothesis, but not statistically significantly stronger.

Q. And what did you -- what did you determine -- excuse me. You did three studies?

A. Yes.

Q. What was the result of the first study?

A. The result of the first study was that about 80 percent of the time going around the boundary, blacks are more heavily represented inside than out and about the same can be said for Democrats.

Q. And was that using convergent segments?

[*490] A. That was using all segments, 100 percent of the segments, all of the segments for which we had data.

Q. Did you do additional studies?

A. Yes, I did one study focused on what I call divergent segments in the Exhibit that we were just looking at. There's reference in the title to divergent segments, so this is a

summary of the second study based on divergent second segments.

Q. Did you do a third study?

A. Did a third study based on segments unequivocally based on divergent, that is by all measures they were divergent.

Q. Did you determine the results of those studies?

A. The same thing. The balance is about equal between the two. Summary of that one is shown in the next exhibit -- or Chart 9 of Exhibit 428.

* * *

[*494] Q. Okay. Now, I believe you have looked at Dr. Weber's statistical tables and you yourself ran a study based on his Table Two in his Exhibit 47?

A. Yes, that's true.

Q. Okay. Could you tell the Court what you did and perhaps show them your exhibit?

[*495] A. Sure.

Q. I believe it's Exhibit 433?

A. Yes, thank you. I don't have a copy of Dr. Weber's Table Two here, but referring to Exhibit 433, I recall that Dr. Weber's Table Two identified all of the counties that were split in the formation of not only the 12th District but other districts as well, including the First. And the point that he makes in looking at his Table Two is that consistently the portion of the county that's included in the 12th District in a split contains blacks to a greater extent than the county -- than the portions of the county not included in the 12th District. And he makes a similar finding with respect to the First District. What I did

was to ask essentially the same question, but with respect to party affiliation rather than racial identity.

What I find is that consistently the portion of split counties that are included in the 12th District contain Democrats to a greater extent than the portions of the counties that were not included in the 12th District, and that's what's reflected on the first page of Exhibit 433. So if I were to follow Dr. Weber's pattern of analysis, I would conclude, based on the first page of Exhibit 433, that party affiliation must have been the predominate factor in the drawing of the boundary of the 12th [*496] District.

Q. What about page two?

A. Page two is an analogous portion of Dr. Weber's Table Two, also based on party affiliation but this time pertaining to the 1st District. And once again, when you split by party affiliation rather than by race, you find that by and large it's the portions of the counties in which Democrats are more heavily represented that are included in the 1st District than the portions of the counties that are excluded.

There's an exception that has to be made for Beaufort, because Beaufort is a county like Davie County, a county in which precinct data are not available and the voter information for Beaufort County, as represented in the state, is really meaningless. You can see there's tiny differences in the portions included and excluded. Those are of no material consequence. We should probably scratch Beaufort off of this Exhibit.

Having done that, if I follow Dr. Weber's pattern and thought I would have to conclude from this part of Table Two

that party affiliation was the predominate factors in the drawing of the boundaries in the 1st District.

Q. Did you do similar analysis with respect to Table Four?

A. Yes, I did.

[*497] Q. Which I believe is splitting municipalities in places?

A. Yes. The results of that are shown in Exhibit 434. Once again, I split -- noted what the party affiliations are of each of the split pieces and noted that in virtually every sense it's the more heavily Democratic portion of the split geographic unit included in the 12th District.

So once again, following Dr. Weber's pattern of thought, I would be forced to the conclusion that party affiliation must have been the predominate factor in the drawing of the boundaries of the 12th District. And on the second page of Exhibit 434 is the analogous analysis for the 1st District. Once again, party affiliation is shown here.

Again, consistently it's the portions of the municipalities with the higher representations of Democrats included in the 1st District, if I follow Dr. Weber. Again, I would have to conclude that party affiliation was the factor predominate in the drawing of the First District.

Q. Dr. Peterson, Dr. Weber testified yesterday. He looked at your chart and he compared it and said, well, you notice that if you look at my tables that the gap in the racial percentage is greater than the gap in your [*498] political percentage?

A. Yes.

Q. Could you comment on that?

A. Oh, sure. Those percentages are measured on two completely different scales and the problem is essentially this:

most of the precincts in North Carolina and in the vicinity of the 12th District contain Democrats in the percentages of 40 to 60 percent. Relatively few precincts contain blacks in the percentage of 40 to 60 percent. Most precincts are either heavily black or heavily white. Most precincts are within a 60/40 mix of being Republican and Democrat.

As you move around North Carolina, you will find much wider representations in the racial mix than you will find in the political mix of the population. So those percentages are simply measured on two different scales. One can't compare directly a difference between racial percentages and a difference between party affiliation percentages. They are not just comparable.

Q. Does this difference in scale relate in any way to the questions that Dr. Weber has been making about your study that does not weigh your results the whole issue of weighing?

A. Sure. One of the complaints that was raised about my analysis in taking this hypothetical walk around the [*499] boundary of the 12th District, all I did was notice whether the representation of Democrats was greater on the inside than the outside or the representation of the blacks. And I didn't take explicit account of the magnitude of the difference, whether it was 20 percent greater or only 2 percent.

Part of the reason for not doing this is trying to figure out some way of dealing with the scale problem because small differences in the percentage between blacks and whites doesn't necessarily equate to small differences in representation between Democrats and Republicans. If one were going to devise a proper measure that took into account magnitudes of

differences, one would also take into account differences in the scale. I'm not sure exactly how to do that.

* * *

[*500] A. There are three things wrong with Dr. Weber's Table 6. The first is that an underlying predicate is that within a county all of the precincts are freely interchangeable in the following sense. That any collection of the precincts in that county could as well be included in the 12th District as any other regardless of the geographic location of those precincts. That's a fault that underlies not only as Table Six, but as Table 1, Table 2, Table 3, Table 4 and Table 5. Of course, that's an unrealistic supposition.

The second thing that's wrong with Dr. Weber's Table 6, is that it's incomplete. It applies only to precincts in which there are a majority of Democrats. And in my Exhibit 435, I have completed Dr. Weber's table to show additionally what the situation is with respect to all of the other precincts.

Q. If I might stop you right here, Dr. Peterson. I think for the Court to understand what you mean by complete, that they need to turn to Exhibit 47.

A. Okay.

Q. Table 6. I apologize, that's in another notebook.

Now, could you explain. Before when you say the table is not complete, could you -- and do you need a copy of Table 6?

[*501] A. I have it in mind, but I don't have a copy in front of me.

Ms. Smiley: Excuse me while I approach the witness.

Q. Now, what do you mean by the table is "not complete"?

A. If we look at the first page, page 56, we see the column headings indicate percent Democratic registration in the range of 50 to 59.9 percent and then 60 to 69.9 percent and greater than 70 percent. But there's no play place in the table for precincts in which the percent Democratic registration is less than 50 percent. So what I have done in Exhibit 435 is to provide the information on the other precincts.

Q. So you have completed the table?

A. So I completed the table, yes.

Q. Could you tell the Court what you conclude in this table?

A. Yes. This is the third point that's troubling about the Table 6, and that is when you complete Table 6 and examine it closely, what you find is that support is about equal even in Table 6 for the party hypothesis and for the racial hypothesis. And I can demonstrate that with the use of just a little analysis of the first page of Exhibit 435 if the Court would care to see it?

* * *

[*506] We tally up the numbers here, see how many R's we have, how many P's we've got. You see we have five P's and two R's. It's evident that there is more support here for the party affiliation hypothesis than there is for the race hypothesis. What may not be so apparent is those two differences are not statistically significant. There were not enough instances of comparison to say the party hypothesis dominates the race

hypothesis. It's clear the race hypothesis does not dominate the party affiliation **[*507]** hypothesis. We could do the same thing with the other tables, and what we would find is essentially the same result.

Q. Dr. Peterson, could you give us, after your various studies and your reviews of Dr. Weber's studies, could you give us your bottom line conclusion?

A. Sure. The statistical evidence is almost vocal in its support of the race hypothesis and party affiliation hypothesis. The two are statistically indistinguishable, but of the two hypotheses, the statistical evidence supports the party affiliation hypothesis marginally better than it supports the race hypothesis.

* * *

[*507] Q Dr. Peterson, I want to look with you at Exhibit 435. If we look at the first -- I'd like to ask you: If you look across these summary charts for all of the precincts **[*508]** involved in all the six counties, is it correct that for those precincts that are 60 percent black, nine of nine are included in the 12th Congressional District?

A. Yes.

Q. And is it true that of those precincts which are greater than 60 percent Democratic by registration, 32 of 63 are included in the Congressional District?

Q. I'm sorry, between 60 and 70 percent?

A. That's correct, yes.

Q. Is it true for those precincts which are voted greater, or which are registered Democratic, greater than 70 percent, 75 of 77 were included in the 12th District?

A. Yes.

Q. But for those greater than 70 percent black, all 49 of 49 are included?

A. That's correct, yes.

Q. Similar data would be shown with respect to the Senate election, the Court election and Lieutenant Governor election on the chart?

A. That's correct.

Q. Has this boundary segment analysis, which you have created, has it ever been applied to any other political districts anywhere in the world at any time in history?

A. I don't know the answer to that question.

Q. Are you aware of any instances where it's been **[*509]** applied elsewhere?

A. No.

Q. Ever been presented at any academic colleges?

A. No.

Q. Ever published in any scholarly journal for criticism or peer review of scholars?

A. No, not that I'm aware.

Q. Did you make the decision how proper segment analysis should be conducted?

A. I designed the study, yes.

Q. You made the decision to look only at the external boundary segments, not to consider in any way issues that relate to the construction of the district with respect to those

precincts which you don't touch the central boundary; is that correct?

A. It's true that the -- that ultimately the calculations depend only on the characteristics of the boundary just as when one draws a contour on a contour map. One has a sense of where the top of the mountain is.

Q. So if, in fact, there were precincts in the internal portion of the district that were largely white or largely Republican, would that affect your analysis in any way? Would it affect your boundary segment analysis?

A. If we had two 12th Districts, one of whose internal precincts were different in composition from the other, **[*510]** but the boundary segments in both 12th Districts were identical, my results would be the same for both.

Q. Have you ever testified in any redistricting cases before?

A. I don't believe so.

Q. And when you made the decisions concerning how boundary segments analysis should be conducted, did you make the decision not to weight the segments based on the populations of the relative of the precincts both inside and outside?

A. I did make that decision, yes.

Q. Did you make the decision to treat all convergent precincts, those which there are more blacks inside the district than outside and more Democrats inside than outside as absolutely equal in what they prove about either a partisan or a racial hypothesis?

A. Yes. Each segment was given an equal vote in determining the outcome of my studies.

Q. You did definitely look at degree of difference between race inside or outside or the degree between politics inside or outside?

A. Part of the reason for that is establishing an appropriate scale to use to normalize the magnitudes of differences.

Q. Did it matter to your analysis where within the **[*511]** geography of the district these segments were located whether they were in the core areas preserved or whether they were in connector areas?

A. Every single segment was given the same voice in determining the outcome regardless of its location.

Q. Is it possible that, in fact, for example, we talked about Davie County and also this district borders on Cabarrus County. Is it possible the explanation for why a boundary was selected may not have to do with race nor partisanship but simply no one wanted to cut up another county, like Davie County?

A. There were reasons for drawing a county where it was drawn that might be different from either race or party affiliation.

Q. Yours is not an additional analysis. This information wasn't available for the legislature to assist in their decision process? This analysis wasn't created at the time of the legislature's action, was it, this boundary segment analysis?

A. No. This was done after the boundary of the 12th District had been defined. My work was done after the boundary of the 12th District had been defined.

Q. And you are not suggesting that one could substitute the external precinct if it had a greater number of African Americans or Democrats for one internally?

[*512] A. No, there's nothing about my study that presumes substitutability, which is an important distinction between my analysis and Dr. Weber's analysis.

Q. And you were the one who decided to generate the list of segments. You did so by an eyeball inspection of the series of maps rather than any sort of GI system or more technical approach?

A. I don't know how else one would do what we did.

Q. And is it fair to say that there's some issues relating to the data; for example, there are some precincts in which the data reflects that there are more black registered voters in a precinct than there are black adults?

A. Yes.

Q And there are some precincts which the difference between the number of blacks inside and outside might be very small?

A. Yes.

[*515] Q. Isn't it true that as a practical matter for each of the plans from 1991 through 1998 you were the person primarily responsible with actually drafting the plan that was ultimately adopted?

A. I'm not sure if each time I was primarily responsible. Many times I shared responsibilities or perhaps was primarily responsible for the Senate version of the plan.

Q. With respect to the operation of the computer [*516] terminal, were you the person that did most of the operation of the computer terminal with respect to all the plans?

A. Are you asking about all the enacted, the plans enacted?

Q. Yes.

A. I think that other than the House version of the 1997 Plan, I was probably the primary operator and in '91, '92, '97 Senate and '98 Senate.

Q. Now, would it be true that under the operating with the computer terminal that you used, the racial data as to percentage of population, total population, percentage of voting age population and percentage of registered voters was readily available at all times on the screen?

A. Not always. The default certainly had a lot of that data appearing on the screen. Many times I sat for a particular session that defaults differently, so it didn't always appear on the screen.

Q. In any event, it was available if you wanted to use it and much of the time you had it available as you looked over the --

A. Over the decade, yes, but less in the '97 drawing.

Q. Was the data in the computer base as to the registration, the results of the elections, everything else essentially the same from 1991 when you first became [*517] engaged in redistricting right up through 1998 when the most recent plan was adopted?

A. From mid April '91 when we brought the system on line until now, we made no changes in any of the data in the data base in our system.

Q. And you were quite familiar with that data as a result of drawing the different plans certainly by 1997?

A. Yes, sir.

* * *

[*523] Q. Do you recall on or about February 10, 1997, writing a memorandum to an e-mail -- I should say to Leslie Winner and to Roy Cooper?

A. Yes. I probably wrote several e-mails to them. Are you asking about this one in particular?

Q. Yes, I'm referring now to what's Exhibit 58. With respect to that document, that e-mail, do you recall sending such an e-mail on or about February 10, 1997?

[*524] A. Yes, I do.

Q. And in that context, in the last sentence or the last two lines, there is a reference to the Greensboro black community?

A. Yes, sir.

Q. What were you referring to as the "Greensboro black community" when you wrote that memorandum?

A. Well, Senator Cooper had earlier that day or the previous day told me to draw a new plan which would

eliminate the problem in the prior plan that Guilford County was in three Congressional Districts, which he said was not acceptable. And there needed to be no county more than two congressional districts in the state. He asked me to make changes in the plan to have Guilford only in two congressional districts. My basic instruction was to include more of the 12th District -- excuse me, more of Guilford County in the 12th District for several different factors.

And the first thing I did was extend all the way up into Greensboro including, I think, most of two State House Districts and this was actually one sentence at the end of a longer memorandum that really talked about the First Congressional District. And by mentioning the Greensboro black community, I talked about the basic part of a larger group in the precincts that I moved in. I [*525] think I moved 27 precincts in at that time of which the Greensboro black community was about 11 of those 27.

Q. All right. Now, with respect to Guilford County, was any part of Guilford County already in the plan you were developing?

A. Yes. The plan that I was working from at that point had, I think, ten or 11 precincts in High Point; the Guilford County part of High Point in the 12th District already.

Q. Do you recall whether those precincts were predominately African American?

A. I think that five of the nine or ten in High Point at that time were predominately African American in the plan I had been working from at that point. I'm not sure of the exact numbers.

Q. Was that number either decreased or increased at a later time?

A. I believe that when -- the 27 precincts that I moved in that it was referring to in this memo, at least one of them was in High Point, but it was predominately white.

Q. Do you recall approximately the number of African Americans that were in Guilford County at the time of the plan immediately preceding the one that you drew and referred to in that memorandum?

A. I don't recall that number.

[*526] Q. All right. I'm going to show you this map, which purports to indicate racial concentrations in the 1997 Plan?

A. Okay.

Q. I'm going to ask you whether, with respect to Greensboro, whether or not the area that is indicated with red, red checks there, is the Greensboro black community includes the Greensboro black community that you were referring to in your memorandum?

A. Your key there shows those red precincts, shows those being 40 percent or higher black in terms of total population, so I think that certainly is the same sort of -- the red coloring is the same shorthand that I used at the time I talked about the black community in Greensboro.

Q. Do you recall how many African Americans in Guilford County were included in the plan that you submitted at that time?

A. I know the number that I added between the previous plan, which was called '97 Cooper 2.0 and the resulting Cooper 3.0, that I mentioned in this memo, I recall the total number of

people moved and the racial composition, but I don't recall what had been previously and I don't remember the total.

Q. What was the percentage of those you moved as far as **[*527]** race was concerned?

A. I think the total number actually moved, I went back and looked at that after the deposition, was about 108,000 of which about 52,000 were black.

Q. All right. And with respect to the moving the 52,000 black, were they moved in or moved out -- let me rephrase that. You mean a hundred some thousand were moved into the district as a result of this plan?

A. Yes. There were about 102,000 plus population in Guilford County moved from the 6th District to the 12th or from the 5th District to the 12th, because it had been in three different districts at the time.

* * *

[*528] Q. So the 50,000 approximately African Americans who were moved in at that time when you prepared the plan and sent the e-mail remained there in the district from that time on?

A. That's my belief, yes, sir.

* * *

[*529] Q. Would you view the 50,000 as a significant number of African Americans moved into the 12th District?

Ms. Smiley: Objection, Your Honor.

Judge Thornburg: Overruled.

A. I view both the 50,000 African American and 100,000 total as being significant in a district that had a total of about 600,000, yes.

Q. I thought equal populous required 550 some thousand?

A. I guess I rounded it to 600,000.

Q. About 552,000?

A. Yes.

Q. So 50,000 with respect to 552,000 would be roughly 10 percent?

A. Yes.

* * *

[*530] Q. Just with a view to pointing out in the first two lines, you are referring to a change and could you indicate what that change was and what the purpose of the change was?

A. I mention the changes were in Beaufort, Pitt, Craven and Jones Counties. Do you want me to read the sentence?

Q. That will be fine.

A. By shifting areas in Beaufort, Pitt, Craven and Jones County, I was able to boost the minority percentages in the First District from 48.1 to 49.25.

* * *

[*531] Q. In the next paragraph you use the word "improve" on two occasions, I believe. Improving the percentage. What do you have in mind there?

A. Well, in the sentence I mentioned this was all the district could be improved by switching between the First and

Third, unless I wanted to go to Pasquotank, Perquimons or Camden. There since the instructions at that point were to increase the percentage of minority in the district, improvement moving towards that goal, which means increasing the number.

Q. So improve is synonymous with increase African Americans in this particular numbering?

A. Yes, sir

Q. Was that based on the premise that you had to have a majority black in the First District?

Ms. Smiley: Objection to foundation.

Judge Thornburg: I'll let the witness answer to what he had in mind. That's what we're trying to get at here.

A. Could you restate the question?

Q. Indicate what you had in mind then with respect to [*532] achieving a majority black precinct -- majority black district, I mean.

A. The understanding that I received from Senator Cooper was that in order for the plan to pass and in order for what he thought was to perceive approval from the Justice Department along with a bunch of other factors, it was going to need to be more than 50 percent in terms of total population. So that's where we were moving along that track towards.

Q. So your instructions were to create a district with at least 50 percent?

A. I'm not sure right at the point of this memo it was to get it to 50, but I know I was told to make it higher at that point.

Q. It was 49 percent at that point?

A. Yes, sir.

* * *

[*538] Q. Let me ask you one question: Mr. Cohen, have you had an opportunity to look at your Exhibit with the changes and also compare it to Weber's Exhibit 47, Table 5?

A. Yes, I examined both of those against each other.

Q. How many precincts were moved when Greensboro was added to District 12?

A. 29.

[*539] Q. Of those precincts, how many were majority white?

A. 18.

Q. One last question, I hope last question: Do you know about why the Greensboro precincts were added to District 12, this particular move we were talking about?

A. So as to not have Guilford County divided into three districts and so as not to waste Democratic votes in the 6th District since that had been designed as a Republican District. Instead use them to improve the Democratic vote in the 12th District.

Q. What's the source of your information -- that's your belief that that's why they were moved?

A. Yes.

Q. And why do you believe that?

A. Conversations with Senator Cooper at the time the instructions were given.

Q. So he did not give you an instruction to move the black community into District 12?

A. No, he instructed me to move more Guilford County precincts that were predominately Democratic into District 12.

Q. And for the reasons you just stated?

A. Yes, ma'am.

CLOSING ARGUMENT OF ADAM STEIN (EXCERPTS)

[*595] Let me just say one thing about this and that's all I will say about the 12th, unless anybody has any question about the First. Ms. Smiley covered our position. I wanted to make clear that when my clients, some of my clients go back to the *Gingles* case, in fact Ralph Gingles [*596] was an Intervenor in the *Hunt* case -- in the *Shaw* case, and then when this case started he didn't intervene because Gastonia was out. Gaston County was out of the12th District but some of the other people did intervene. Their position all along is, and once we understood the law after *Shaw versus Hunt*, that there couldn't be -- there was not a basis for majority\minority district in the 12th.

[This page intentionally left blank.]

Exhibit 23 Type P Divergent Segments Using Democratic and Black Registration

Obs	Segm.	Internal County	Precinct	External County	Precinct	Inside 12 % Black	Inside 12 % Dem	Outside CD 12 % Black	Outside CD 12 % Dem
6	6	Mecklen.	Charlotte 81	Mecklen.	Charlotte 80	0.1484	0.61	0.1521	0.57
37	37	do.	Charlotte 29	do.	Charlotte 5	0.16	0.6382	0.17	0.6343
40	40	do.	Charlotte 61	do.	Charlotte 84	0.13	.062	0.19	0.6
41	41	do.	do.	do.	Charlotte 95	do.	do.	0.17	0.56
53	54	Iredell	Coddle Creek 3	Cabarrus	0.0301	0.03	0.56	0.09	0.53
54	55	do.	Coddle Creek 4	do.	do.	0.05	0.61	do.	do.
211	207	do.	Cool Springs	Iredell	Turnersburg	0.17	0.68	0.19	0.67
223	219	do.	Barrington	do.	Fallstown	0.010496	0.6232	0.011396	0.6165
80	81	Rowan	Spencer	Rowan	Trading Ford	0.09	0.75	0.15	0.61
81	82	Davidson	Boone	do.	do.	0.04	0.66	0.15	0.61
82	83	do.	do.	Davidson	Cotton	do.	0.662	0.15	0.6564
205	203	do.	do.	Davie	0.025	do.	do.	0.08	0.4
84	85	do.	Ward 2	Davidson	Cotton	0.08	0.68	0.15	0.66
139	140	Guilford	GB 15	Guilford	GB 14	0.16	0.71	0.22	0.69
144	145	do.	GB 24	do.	GB 23	0.201	0.6595	0.2087	0.6574
150	151	do.	Jamestown 2	do.	GB 24C	0.05	0.51	0.06	0.38
151	152	do.	HP 19	do.	Friendship 2	0.03	0.66	0.04	0.55
152	153	do.	do.	do.	HP 20	do.	do.	0.12	0.44
154	155	do.	do.	do.	HP 17	do.	do.	0.18	0.58
160	161	do.	HP 1	do.	HP 4	0.0033	0.56	0.00331	0.49

Obs	Segm.	Internal County	Precinct	External County	Precinct	Inside 12 % Black	Inside 12 % Dem	Outside CD 12 % Black	Outside CD 12 % Dem
199	200	Davidson	Reedy Creek	Davie	0.035	0	0.42	0.08	0.4
200	200.1	Do.	do.	do.	0.02	Do.	do.	0.07	0.4
201	201	do.	Yadkin College	do.	do.	0.06	0.58	Do.	Do.
202	201.1	Do.	Reeds	do.	do.	0.03	0.51	Do.	do.
203	202	do.	Tyro	do.	do.	0.05	0.53	Do.	do.
204	202.1	Do.	do.	do.	0.25	Do.	do.	0.08	0.4

Exhibit 24 Type R Divergent Segments Using Democratic and Black Registration

Obs	Segm	Inside County	Inside Precinct	Outside County	Outside Precinct	Internal Precinct % Black	Internal Precinct % Dem	External Precinct % Black	External Precinct % Dem
19	19	Mecklen.	Charlotte 97	Mecklen.	Charlotte 58	0.24	0.51	0.08	0.53
39	39	do.	Charlotte 61	do.	Charlotte 45	0.13	0.62	0.1	0.63
46	47	do.	CO 2	Cabarrus	0.0103	0.12	0.54	0.02	0.54
231	227	do.	HUN	Mecklen.	LC1 - North	0.13	0.57	0.1	0.63
87	88	Davidson	Ward 2	Davidson	Ward 6	0.08	0.68	0.08	0.72
96	97	do.	Arcadia	do.	Welcome	0.03	0.44	0.02	0.51
195	196	do.	do.	Forsyth	South Fork 2	do.	do.	0.02	0.53
196	197	do.	Hampton	do.	do.	0.03	0.38	do.	do.
97	98	do.	Midway	do.	do.	0.06	0.42	do.	do.
98	99	do.	do.	Davidson	Thomasville 6	do.	do.	0.01	0.43
117	118	Guilford	Jamestown 2	Guilford	South Sumner	0.05	0.51	0.02	0.51
149	150	do.	do.	do.	Friendship 2	do.	do.	0.04	0.55
141	142	do.	GB 18	do.	GB 17	0.09	0.63	0.08	0.68
214	210	Iredell	Eagle Mills	Iredell	Statesville 1	0.07	0.55	0.06	0.65
58	59	do.	Chambersberg	Rowan	Mt. Ulla	0.07	0.55	0.06	0.59

[This page intentionally left blank.]

EXHIBIT 25 SUMMARY OF DIVERGENT PRECINCTS AND SEGMENTS BY COUNTY

County	Type P Precincts/Segments Black Pop.		% of CD 12	Type R Precincts/Segments	
Davidson	6	10	3.8	4	6
Iredell	4	4	3.6	2	2
Rowan	1	1	4.6	0	0
Forsyth	0	0	16.7	0	0
Guilford	5	7	27.2	2	3
Mecklenburg	3	4	44	4	4

[This page intentionally left blank.]

EXHIBIT 47 (EXCERPTS)

[Caption Omitted in Printing]

DECLARATION OF DR. RONALD E. WEBER

I, Ronald E. Weber, Ph.D., declare pursuant to 28 U.S.C. 1746 as follows:

1. I am currently the Wilder Crane Professor of Government in the Department of Political Science at the University of Wisconsin, Milwaukee, Wisconsin; President of Campaign and Opinion Research Analysts, Inc.; former co-editor of The Journal of Politics and Chairman of the Department of Political Science at the University of Wisconsin, Milwaukee; former Fulbright Commission John Marshall Professor of Political Science at the Budapest University of Economic Sciences and the Central European University, Budapest, Hungary (1996-97); and former President of the Southern Political Science Association (1997-98). I received my B.A. in Political Science and History from Macalester College, St. Paul, MN, in 1964 and a Ph.D. in Political Science from Syracuse University in 1969, with specialties in American state [*2] politics, voting behavior, and quantitative analyses of political data.

* * *

3. I have been retained as a consultant and expert witness in a number of redistricting and voting rights cases and have been qualified as an expert by the U.S. District Courts in [22 instances].

* * *

[*3] I have testified in a number of Congressional and state legislative redistricting cases . . . I also have extensive experience developing redistricting plans for local and state government clients and assisting them with preclearance of those plans under Section 5 of the U.S. Voting Rights Act of 1965, as amended in 1982.

* * *

[*4] 5. I address the following questions in analyzing whether the 1997 U.S. Congressional redistricting in North Carolina results in a violation of the Fourteenth and Fifteenth Amendments of the U.S. Constitution in accord with factors set forth by the U.S. Supreme Court in Shaw v. Reno, Miller v. Johnson, Shaw v. Hunt, and Bush v. Vera:

(1) whether race was the predominant factor used by the state of North Carolina to draw the boundaries of the 1997 U.S. Congressional districts;

(2) whether the state of North Carolina in creating the U.S. Congressional districting plan of 1997 subordinated traditional race-neutral districting principles, such as compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations;

(3) whether the political explanation for the Plan A Congressional districts adopted in 1997 offered

by state defendants and their expert Professor Peterson has credibility or can be characterized as a post-hoc rationalization for the districting plan;

[*5] (4) whether the African-American voting age population anywhere in North Carolina is sufficiently large and geographically concentrated enough to constitute a potential voter majority using traditional districting principles to draw a single-member Congressional district;

(5) whether African-American voters residing in Districts 1 and 12 in the Act 586 plan of 1997 participate at lower rates than white voters in recent state-wide elections, indicating some evidence that a history of official discrimination has led to politically significant differences in political participation in the districts as drawn in 1997;

(6) whether sufficient levels of white crossover voting exists in the northeast and Piedmont regions of North Carolina such that fair U.S. Congressional districts can be drawn that do not need to be majority African-American in voting age population or voter registration in order to allow African-American voters a reasonable opportunity to elect candidates of choice in U.S. Congressional elections; and

(7) whether race-predominant U.S. Congressional Districts 1 and 12 in the 1997 North Carolina plan are overly safe from the standpoint of giving a candidate of choice of African-American voters

an opportunity to be elected, thus questioning whether the plan was [*6] narrowly tailored to satisfy a compelling state interest.

6. The results of my analysis to date will be presented in this declaration in the following form: in Section I, I will outline briefly the history of Congressional districting in North Carolina since 1960; in section II, I will describe the analyses conducted to answer the first two questions and set forth my conclusions on those questions; in section III, I will describe the analyses conducted to answer the third question relating to the political explanation offered by Professor Peterson; in section IV, I will describe the analyses conducted to answer the fourth question relating to size and concentration of African-American voters in North Carolina; and in sections V, VI, and VII, I will discuss participation rates of African-American and white voters as well as white crossover rates in recent statewide elections within two regions of North Carolina and the electoral safeness of North Carolina Congressional districts 1 and 12. Tables, charts, and exhibits relevant to my analyses will be included within the body of the declaration or as attachments to this declaration.

[*7]FINDINGS

I. HISTORY OF RECENT CONGRESSIONAL REDISTRICTINGS IN NORTH CAROLINA

* * *

[*8] 10. As was true following the 1970 Census of Population, the 1980 Census of Population revealed that the 11 districts of the 1970s were out of population balance. Thus, the North Carolina General Assembly had to adjust the populations of the 11 districts before the 1982 elections. The first plan adopted in July, 1981 did not receive pre-clearance under Section 5 by the U.S. Department of Justice. The General Assembly followed-up with a revised plan that satisfied the Department of Justice's [*9] objections in a special session of February, 1982. For the first time in the modern history of North Carolina, it was necessary to split four counties in order to balance the populations across the districts. Avery, Johnston, Moore, and Yadkin counties were each split across two districts. The town of Chapel Hill as well as the city of High Point were each split across two districts owing to the fact that those two places cross county lines and the General Assembly decided to draw the Congressional districts using county lines between Orange and Durham counties and between Guilford and Randolph counties. These 11 districts were used in the elections of 1982-1990.

11. The population of the state of North Carolina grew more rapidly than the U.S. as a whole between 1980 and 1990,

and thus the Congressional apportionment following the 1990 Census of Population allocated an additional seat to North Carolina, bringing the size of the Congressional delegation back to 12 seats as it had been in the 1950s.

* * *

[*10] 12. I conclude this section by making several observations. First, the sub-dividing of counties to achieve equally populated Congressional districts in North Carolina is a relatively recent occurrence, taking place for the first time with the splitting of just four counties in the early 1980s. Second, no county in North Carolina is large enough that it must of necessity be sub-divided to comply with the principle of "one-person, one-vote". Mecklenburg County, the largest county in population in North Carolina, is slightly smaller than a current Congressional district. Third, . . . at the maximum a total of eleven North Carolina counties might need to be split to create an equally populous twelve district plan, by using whole counties to create Congressional districts and then splitting just one county to balance the population between each of two districts. Fourth, despite the fact that the number of persons needed to populate an equitably populous plan increases each decade (after the 1980 Census the ideal district size was 534,706; after 1990 it was 552,386; and after 2000 it could be as high as 648,104 based on recent state population projections), the percentage of African-American persons in the [*11] North Carolina population declined between 1980 and 1990. As Professor Alfred W. Stuart's report for this case reveals, it is likely that the African-American percentage of the

total state population will be less in 2000 that it was in 1990. Thus, as the average size of a Congressional district increases, the number of African-American persons of voting age available to constitute a majority of voters in a Congressional district does not increase as rapidly (I will return to this point more specifically later). Finally, as I will consistently point out below, the appropriate social science benchmark for comparison of the challenged plan is the plan of the 1980s (with 11 districts) and not the constitutionally invalidated 12 district plan of the 1990s.

* * *

II. ANALYSIS OF DISTRICTING CRITERIA EMPLOYED BY STATE

* * *

[*12] 14. The question of whether race was the predominant factor used by the state of North Carolina to draw the boundaries of the U.S. Congressional districts in 1997 can be addressed by an examination of both tabular data prepared by the North Carolina Information Systems Division from data compiled by the U.S. Bureau of the Census and maps created on the computer facilities of the North Carolina General Assembly Legislative Services Office Redistricting System. Data from both sources are reported in tabular form and on maps to display the use of race as a redistricting criterion.

15. . . . Table 1 reports for each 1997 North Carolina Congressional district the racial composition of the total population of the counties that were sub-divided in the creation of the plan using data from the County Split Assignments Report of March 26, 1997 of the North Carolina Information Systems Division. For both Districts 1 and 12 that were created to elect an African-American member of Congress, the county splits show a **[TABLE 1 relocated to 319 - 391] [*15]** typical pattern of African-American total population majorities in the largest jurisdictions of each district. A total of 22 counties are split across the 12 districts and just one district (District 11) is composed of whole counties. Ten of the split counties are accounted for by the construction of District 1, while another six are accounted for by District 12. Six other counties are split in the plan. Half of the counties in District 1 are split, while 100 percent of the counties (all six) are split in the creation of District 12.

16. Turning first to District 1, six of the ten counties wholly within the district have African-American population majorities and the other four counties have African-American population percentages of at least 42 percent. The racial make-up of the parts of the ten sub-divided counties assigned to District 1 include four with parts over 50 percent African-American, four others with parts of over 40 percent African-American, and two with parts of over 30 percent African-American. The African-American percentage of the total population in the counties split across District 1 and another district is above the district-wide African-American percentage in four counties. The African-American percentage of the total

population is above 60 percent in Lenoir County and above 50 percent in Pitt, Wayne, and Wilson Counties. Conversely, Table 1 reports that the African-American percentage of the total population in the parts of most of those split counties assigned to another district than **[*16]** District 1 is consistently lower. For example, the part of Lenoir County assigned to District 3 is 13.6 percent African-American in total population, while the part of Pitt County allocated to District 3 is 18.1 percent African-American in total population. The county splits as they impact the white majority districts in eastern North Carolina can be divided into two categories: 1) those county splits for the districts where the intent usually was to provide African-American voters to shore up the electoral bases of candidates who might be characterized as candidates of choice of African-American voters (e.g. Districts 2 and 4), and 2) those county splits for the district where the intent usually was to carve out African-American voters so as not to endanger the electoral bases of the candidates who might not be characterized as candidates of choice of minority voters (e.g. District 3). Almost every time there was an opportunity to use race as the basis for dividing political subdivisions up politically, the North Carolina Congressional districting plan does it in the eastern part of the state.

17. Turning next to District 12, the racial make-up of the parts of the six sub-divided counties assigned to District 12 include three with parts over 50 percent African-American and three in which the African-American percentage is under 50 percent. Almost 75 percent of the total population in District 12 comes from the three county parts which are majority

African-American in population. Mecklenburg, Forsyth, and Guilford [*17] counties which contribute almost 75 percent of the district's total population are located at the extremes of the district. The other three county parts (Davidson, Iredell, and Rowan) have narrow corridors which were designed to pick up as many African-American persons from each of those counties to fill out the district to an ideal sized district. A precinct level map of District 12 shows that all African-American majority precincts but one in those three counties have been assigned to the district. Conversely, Table 1 reports that the African-American percentage of the total population in the parts of those split counties assigned to another district than District 12 is consistently lower. For example, the part of Mecklenburg County assigned to District 9 is 7.2 percent African-American in total population, while the part of Forsyth County allocated to District 5 is 11.1 percent African-American in total population and the part of Guilford County assigned to District 6 is 10.2 percent African-American. The county splits as they impact the white majority districts adjacent to District 12 in the Piedmont are those county splits for the districts where the intent usually was to carve out African-American voters so as not to endanger the electoral bases of the candidates who might not be characterized as candidates of choice of minority voters (e.g. Districts 5, 6, and 9). Almost every time there was an opportunity to use race as the basis for dividing political subdivisions up politically, the North Carolina Congressional districting plan does it in the Piedmont part of the state as [*18] well.

18. Table 2 provides further confirmation that race was the predominant factor in the drawing of the lines for the North Carolina Congressional districts in 1997. This table reports the exact same data as in Table 1 except that in Table 2 the data are organized by county rather than Congressional district. For example, the pattern shown in each of the ten counties that are split between District 1 and an adjacent district is one in which most of the time the sub-division was along racial lines. All ten counties were split along racial lines. The most dramatic examples from Table 2 include Lenoir County where 61.1 percent of the total population allocated to District 1 is African-American while only 13.6 percent of the total population assigned to District 3 is African-American, and Wilson County where 51.0 percent of the total population allocated to District 1 is African-American while only 12.0 percent of the total population assigned to District 2 is African-American. A similar pattern holds in the other eight counties of District 1. In each of those counties, the population on the District 1 side of the Congressional district line is more strongly African-American while being more strongly white on the other side of the line in an adjacent district. When counties were split to achieve population equality, the racial composition of the components differ little. When the splits are for racial purposes, the differences are large. **[TABLE 2 relocated to 323 - 325]**

[*21] 19. The pattern shown in each of the six counties that are split between District 12 and an adjacent district is one in which most of the time the sub-division was along racial lines. All six counties were split along racial lines. The most

dramatic examples from Table 2 include Forsyth County where 72.9 percent of the total population allocated to District 12 is African-American while only 11.1 percent of the total population assigned to District 5 is African-American, and Mecklenburg County where 51.9 percent of the total population allocated to District 12 is African-American while only 7.2 percent of the total population assigned to District 9 is African-American. Similarly, I find Guilford County where 51.5 percent of the total population allocated to District 12 is African-American while only 10.2 percent of the total population assigned to District 9 is African-American. A similar pattern holds in the other three counties of District 12. In each of those counties, the population on the District 12 side of the Congressional district line is more strongly African-American while being more strongly white on the other side of the line in an adjacent district. When counties were split to achieve population equality, the racial composition of the components differ little. When the splits are for racial purposes, the differences are large. I can infer from these data that race was a predominant factor in the line drawing for Districts 1 and 12 and the adjacent districts in the 1997 North Carolina Congressional district plan.

* * *

[*22] 21. I have also examined data related to city and town splits in 1997 North Carolina Congressional district plan. These **[*23]** data will be used to determine whether I should alter my opinion that race was a predominant factor in the construction of the districts. Using a report titled Places Split

by 97 North Carolina Congressional Districts prepared by Dan Frey, GIS Analyst, with the North Carolina General Assembly Information Systems Division, I created Tables 3 and 4. These tables are directly comparable to Tables 1 and 2. Note that these tables include every city or town in North Carolina that is split across two or more districts by geography in the 1997 plan. Thus, there are four places where the geographical split does not involve people on both sides of the line. Furthermore, there are several others where a small number of people are split away from a larger number of people by the use of the precincts in the 1997 Congressional districting plan.

22. According to Table 3, 11 of 13 cities or towns were split along racial lines to create Congressional district 1. Nine of the cities or towns split between district 1 and another district involve placing a majority of the African-American population into District 1 as displayed in Table 3. When cities or towns were split to achieve population equality, the racial composition of the components differ little. When the splits are for racial purposes, the differences are large.

23. A similar pattern of splitting cities or towns is shown for District 12. Nine of 13 cities or towns were split along **[TABLE 3 relocated to 327 - 331; TABLE 4 relocated to 333 - 337]** **[*30]** racial lines to create Congressional district 12. Five of the cities or towns split between district 12 and another district involve placing a majority of the African-American population into District 12 as displayed in Table 3. Also the four largest cities assigned to District 12 are split along racial lines.

24. The above analysis is further confirmed by the listing of split cities and towns in Table 4. Here one can see how most of the cities and towns assigned to District 1 are split along racial lines. Particularly striking are the figures for Goldsboro, Greenville, Kinston, Rocky Mount, and Wilson. Table 4 also highlights the racial splits of the cities or towns assigned to District 12. Again the difference in the figures for Charlotte, Greensboro, High Point, Statesville, and Winston-Salem are large. On the other hand, many of the cities and towns split between other districts do not display large racial differences (exceptions are Fayetteville and Raleigh).

25. Defendants' experts point out that the 1997 North Carolina Congressional districting plan relies almost without exception to the 1990 Voting Tabulation Districts (VTDs) or precincts as the building blocks for constructing districts. They note that only two precincts were split in constructing the 12 districts. One of these two precincts is in Mecklenburg County and was split to provide a geographical land bridge to connect two parts of District 9 to each other. The precinct in **[*31]** discussion is Charlotte Precinct 77 and extends to the southern county boundary and the state line with South Carolina. The precinct is a predominantly African-American majority precinct and the bulk of the people was needed to create a race-based District 12. Thus, the state split the precinct placing one non-African-American person in the part of the precinct in District 9. If that one person is a registered voter and does vote in a Congressional election, there will be a ballot secrecy issue for that one voter. The other split precinct is in

Craven County where 23 persons are put in District 3 rather than District 1 with remainder of the precinct's residents.

26. The discussion of not splitting precincts by defendants' experts misunderstands how racially homogeneous precincts are today in North Carolina and other parts of the nation. For example, both Georgia and South Carolina, split only a small number of precincts in creating their Congressional Districting plans of the 1990s but this fact did not prevent plaintiff challenges from invalidating Districts 2 and 11 in Georgia and from attacking District 6 in South Carolina. Louisiana did not split a single precinct in the creation of the two plans invalidated by the Hays court in the Western District of Louisiana. Thus, given the homogeneous racial character of precincts in North Carolina, it is quite possible to draw districts in which race predominates using whole precincts.

[*32] 27. Next I present Table 5 which details at the precinct level by county the assignment of precincts to Congressional districts for the 22 counties that were split in creating the 1997 Plan (HB 586). For the counties which were split predominantly on the basis of race I expect that the precincts with the highest percentage of African-American persons will be placed in either District 1 or 12 and the precincts with the highest percentage of non-African-American persons will be placed in an adjacent district. For the counties which were not split predominantly on the basis of race, I expect to find a less systematic assignment of precincts to the two districts into which the population is divided. To assist the reader in

following the tables, I have ranked the precincts from high to low by the percentage of African-American population in each precinct (see Table 5). The table also reports a breakdown of the voting age population by race as well as the total population by race. Finally, the district to which the precinct is assigned in the 1997 Plan is noted in the final column of the table.

* * *

[*38] 39. . . . The patterns revealed in Tables 1-4 are reinforced by the precinct level data in Table 5 for the six split counties of District 12. Two groupings of counties are most apparent: those where the difference between African-American percentage of the total population assigned to District 12 is greater than 20 percentage points higher than the African-American percentage assigned to the adjacent district and **[*39]** those where the difference in the African-American percentage is less than 20 percentage points. Forsyth, Guilford, Mecklenburg, and Rowan counties fall into the former category, while Davidson, and Iredell counties are in the latter category.

40. I first examine the precinct assignment pattern for Forsyth County which includes the city of Winston-Salem and where the most severe of racial disparities exist between Districts 5 and 12. All 15 African-American majority precincts in the county are assigned to District 12, while all but four of the white majority precincts in Forsyth County are assigned to District 5. No precinct in which more than 20.39 percent of the total population is African-American is allocated to District 5.

The assignment of Forsyth County precincts between Districts 5 and 12 is the clearest pattern of the predominant use of race in the creation of District 12 in the 1997 Plan in the Piedmont region of North Carolina.

41. I next look at the precinct assignment pattern for Mecklenburg County which includes the city of Charlotte and where very severe racial disparities exist between Districts 9 and 12. All 28 African-American majority precincts in the county are assigned to District 12, while all the precincts where around 85 percent or more of the population is white in Mecklenburg County are assigned to District 9. Some white majority precincts are allocated to District 12, but for the most part these assignments **[*40]** are made to provide contiguous paths from the African-American majority precincts north to Iredell County so as to connect African-American populations in Charlotte with those in Winston-Salem, High Point, and Greensboro. The assignment of Mecklenburg County precincts between Districts 9 and 12 shows a very clear pattern of the predominant use of race in the creation of District 12 in the 1997 Plan in the Piedmont region of North Carolina.

42. I next examine the precinct assignment pattern for Guilford County which includes the cities of Greensboro and High Point and where severe racial disparities exist between Districts 6 and 12. All 17 African-American majority precincts in the county (all of which are in either Greensboro or High Point) are assigned to District 12, while almost all of the precincts where around 80 percent or more of the population is white in Guilford County are assigned to District 6. Some

white majority precincts are allocated to District 12, but for the most part these assignments are made to provide contiguous paths from the African-American majority precincts in Greensboro and High Point southwest to Davidson County so as to connect African-American populations in Greensboro and High Point with those in Winston-Salem and Charlotte. The assignment of Guilford County precincts between Districts 6 and 12 is another clear pattern of the predominant use of race in the creation of District 12 in the 1997 Plan in the Piedmont region of North Carolina.

[*41] 43. I next examine the precinct assignment pattern for Rowan County including the city of Salisbury which is split between Districts 6 and 12. Three of the four African-American majority precincts in the county (the one African-American majority precinct assigned to District 6 is a small non-contiguous part of large white majority precinct)are assigned to District 12, while almost all of the precincts where around 80 percent or more of the population is white in Rowan County are assigned to District 6. Some white majority precincts are allocated to District 12 to provide contiguous paths from Iredell County to Davidson County so as to connect African-American population concentrations in Charlotte with those in Winston-Salem, High Point, and Greensboro. The assignment of Rowan County precincts between Districts 6 and 12 is another clear pattern of the predominant use of race in the creation of District 12 in the 1997 Plan in the Piedmont region of North Carolina.

44. Turning next to the two counties split between Congressional District 12 and an adjacent district where the difference in the African-American percentage of the total population is less than 20 percentage points, I examine first Iredell County. Only nine precincts in this county are assigned to Congressional District 12, including two African-American majority precincts in the city of Statesville. The white majority precincts allocated to District 12 are there to provide **[*42]** contiguous paths from Mecklenburg County to Rowan County so as to connect African-American population concentrations in Charlotte with those in Winston-Salem, High Point, and Greensboro. The assignment of Iredell County precincts between Districts 10 and 12 provides further evidence of a pattern of the predominant use of race in the creation of District 12 in the 1997 Plan in the Piedmont region of North Carolina.

45. I next examine the assignment of precincts between Congressional Districts 6 and 12 in Davidson County. A total of 20 precincts in this county are assigned to Congressional District 12, including two African-American majority precincts in the city of Lexington and one in the city of Thomasville. The white majority precincts allocated to District 12 are there to provide contiguous paths from Rowan County to Forsyth and Guilford counties so as to connect African-American population concentrations in Charlotte with those in Winston-Salem, High Point, and Greensboro. The assignment of Davidson County precincts between Districts 6 and 12 provides further evidence of a pattern of the predominant use of race in

the creation of District 12 in the 1997 Plan in the Piedmont region of North Carolina.

* * *

[*43]47. I began to answer the question of whether the districts in the 1997 North Carolina Congressional districting plan subordinate race-neutral traditional redistricting principles when I discussed above the tabular data on the splitting of counties, cities, towns, and precincts. The state of North Carolina subordinated the splitting of county, city, and town boundaries to a desire to allocate persons by race to a greater [*44] extent than necessary to comply with the one-person, one-vote standard of population equality. This was particularly true in the drawing of Districts 1 and 12 as well as adjacent districts. A total of 22 counties and 41 cities and towns were split in the drawing of the 1997 North Carolina Congressional districting plan, for a total of 63 split political subdivisions. Only six counties and 15 cities and towns were split to create the other districts (several of the cities and towns were split because they are on a county boundary and different counties were assigned to different districts). In the recent past no counties had been split to create the 11 districts of the 1960s and 1970s, while just four had been split to construct the 11 districts of the 1980s. The maximum number of counties needed to be split to fashion a 12 district plan is 11, allowing for one county to be split between each two districts.

48. A report by David C. Huckabee, "Congressional Districts: Objectively Evaluating Shapes," CRS Report for

Congress (Washington: Congressional Research Service, The Library of Congress), May 24, 1994, also contains information from other states to compare with the experience of North Carolina in Congressional districting.

* * *

[*45]49. Huckabee also provides information on the percentage of split counties allocated to the Congressional districts of the 1990s. There are a large number of Congressional districts from around the nation which have 100 percent of the counties split which are allocated to a district. Most of these are plans involving splits of large counties in the metropolitan areas of the country and these plans are not comparable to the North Carolina setting. No single district in the country is like North Carolina 12 in splitting as many as six counties and sub-dividing 100 percent of them.

50. Huckabee also provides information on the number of places having populations of 10,000 or more and indicates how [*46] many of these are split by district lines. In the 1997 plan, North Carolina district 1 has nine such places (either cities or towns, and six of them are divided between district 1 and another district. District 12 has eight cities or towns 10,000 or more in population, and all eight of them are split between districts.

51. Another race-neutral traditional redistricting criterion involves the issue of geographical contiguity. I have examined the maps of the 1997 Congressional districting plan

to determine whether the state adhered to geographical contiguity in the construction of the plans. I find that the plans are technically contiguous in that parts of geographical territories are joined together through water areas or narrow land bridges. A person wishing to traverse Congressional district 3 by automobile, for example, would have to leave the district, then go through another district, before returning to district 3. The best examples of technical contiguity occur in Beaufort and Pamlico counties where two parts of district 3 are joined across the Pamlico Sound, in the city of Charlotte where two parts of district 9 are connected through a split precinct at the southern edge of Mecklenburg County, and in Guilford County and the city of High Point where a narrow land bridge is used to connect Davidson County with the city of Greensboro in Guilford County. Although the Congressional districts are technically contiguous, the district lines do not promote functional contiguity. Anyone serving districts 3, 9, and 12 in the U.S. Congress will need to **[*47]** travel usually outside each district in order to traverse the district each is serving in the most efficient manner.

52. Another race-neutral traditional redistricting principle involves the issue of geographical compactness. The issue of geographical compactness can be addressed first by examining maps of the 1997 Congressional districts. A statewide map of the 1997 districts and detailed maps of Districts 1 and 12 demonstrate clearly that Districts 1 and 12 as well as adjacent districts are oddly shaped and not compact.

53. A second way to assess the compactness of a Congressional district is to use a variety of compactness measures now standard in political science. These measures are reported upon in two works--1) Richard H. Pildes and Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after Shaw," Michigan Law Review, Vol. 92 (December 1993), pp. 101-205, and 2) David C. Huckabee, "Congressional Districts: Objectively Evaluating Shapes," CRS Report for Congress (Washington: Congressional Research Service, The Library of Congress), May 24, 1994. The actual computations of the compactness scores reported in these two works were conducted by Kimball Brace and Douglas Chapin of Election Data Services, Inc., Washington, D.C.

54. Three measures of compactness are reported in the **[*48]** Huckabee report for all 435 Congressional districts in the U.S. adopted following the release of the 1990 Census of Population. Huckabee adopts two geographic measures--a dispersion measure and a perimeter measure--and one population measure. Pildes and Niemi rely on the same two geographic compactness measures reported by Huckabee. Gerald Webster in his report for the defendants in this case use the same two geographic compactness measures as Pildes and Niemi as well as Huckabee.

55. Combining information about the two measures of geographical compactness in the Huckabee report with those in the Webster report I can see that North Carolina's Congressional District 12 is still the least compact district in

North Carolina on both indicators of geographic compactness and that District 1 is the second least compact district on the perimeter measure and the fourth least compact district on the dispersion measure. In Appendix E of the Huckabee report, he reports a table containing the two geographic compactness scores for the bottom ten percent of Congressional districts in the nation. Using the criterion of having at least one compactness score in the bottom ten percent, North Carolina 12 would clearly continue in that compilation while North Carolina 1 would probably not make the list of the worst ten percent of the districts even though many of the lowest districts in Huckabee's table have moved up to higher scores will revised districts. A number of congressional districts in other states with lower perimeter or dispersion scores have been found **[*49]** to be unconstitutional by Federal district courts. North Carolina 12 is less compact than struck-down Florida 3 on one indicator, than invalidated Georgia districts 2 and 11 on both indicators, than unconstitutional Louisiana 4 on one indicator, than invalidated New York 12 on one indicator, than struck-down Texas districts 18, 29, and 30 on one indicator, and unconstitutional Virginia 3 on both indicators. I have also taken the perimeter and dispersion compactness scores from the Huckabee report and revised the ranking order for the worst districts on each measure (this process has used the best information on the two compactness scores for the current Congressional districts, some of which is contained in the Webster report). North Carolina 12 ranks either 430 or 431 out of 435 in compactness using the dispersion measure (I am unable to determine whether the state of New York increased the compactness of District 8 when it recently reworked is plan

to remedy the unconstitutionality of District 12). North Carolina 12 ranks either 432 or 433 of 435 in compactness using the perimeter measure. Thus, North Carolina 12 continues to be the least compact district in North Carolina and among the worst in the nation in terms of geographical compactness.

56. Pildes and Niemi report geographic compactness scores for the Congressional districts of the 1980s using the dispersion and perimeter measures. These scores for the old 11 districts in North Carolina are used to compare to the scores for the current **[*50]** 12 districts in the 1997 plan.[1] The range on the dispersion measure in North Carolina runs from a low of .26 to a high of .57 and averages .36 across the 11 districts in the 1980s. In the 1997 plan, the range on the dispersion measure runs from a low of .11 to a high of .62 and averages .35 across the current 12 districts. The range on the perimeter measure in North Carolina runs from a low of .22 to a high of .46 and averages .30 across the 11 districts in the 1980s. In the 1997 plan, the range on the perimeter measure runs from a low of .04 to a high of .33 and averages .19 across the current 12 districts. This comparison reveals that the 1997 12 district plan is less compact overall than the 11 district plan of the 1980s, using the two standard measures of geographic compactness.

* * *

[1] Richard H. Pildes and Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after Shaw," Michigan Law Review, Vol. 92 (December 1993), Table 6, pp. 189-91.

[*52] III. EVALUATION OF THE POLITICAL DEFENSE OF DISTRICT 12

59. I conclude that the political defense of Congressional District 12 offered by state defendants and their expert Professor David W. Peterson is nothing more than a post-hoc rationalization in an attempt to mask a true aim of including as many African-American persons as possible in District 12 given a decision to make the district up of persons from six counties. To permit a political explanation to trump the racial explanation, Professor Peterson would need to know that the state actually displayed political data on the computer screen as the plan's designer was doing his/her work. The computer screen used by the North Carolina Legislative GIS system displays racial breakdowns as the plan designer is working and does not display political breakdowns. Only after the plan is completed can a designer assess the political character of the district created. Assessment of the political character of a district is post-hoc and cannot be done while precincts are being allocated to a district. Other problems exist with the analyses of Professor Peterson which I will outline below.

60. Professor Peterson concentrates on the margins of Congressional District 12; he ignores the core. His measure focuses on the precincts just inside or just outside the district. These precincts -- even the ones just inside District 12 -- are less heavily black than the ones in the center of the [*53] urban areas included in the district. He should be focusing on the

core of the district rather than focusing on the periphery, where decisions probably came late in the process, i.e., is precinct X to be included or excluded.

61. Professor Peterson's segment analysis is flawed. Unless adjacent precincts inside and outside of Congressional District 12 have equal populations, then it would not be possible to substitute one for the other. In other words, an outside precinct may have been rejected because its inclusion -- or more likely the substitution of the precincts needed to eliminate the Type R divergences -- would have violated the equal population requirement. Professor Peterson needs to demonstrate that when comparing inside and outside precincts they have nearly equal populations. Unless the population differences are trivial, it would be necessary for him to make comparisons on groups of precincts inside and outside Congressional District 12 that have nearly equal populations.

62. According to Professor Peterson at paragraph #9 of his affidavit of February 27, 1998, a perfect correlation requires that a precinct would never be excluded if it has more African-American persons than an adjacent included precinct. One problem with making this precinct-by-precinct assessment is that failure to include a precinct that is six percent African-American counts against the Racial Hypothesis if the adjacent precinct in [*54] Congressional District 12 is five percent African-American. The six percent African-American precinct may have been excluded because elsewhere in the district a 40 percent African-American precinct was included and the

population ceiling precluded adding the six percent African-American precinct.

63. Since with rare exceptions in North Carolina, African-American voters cast more than 90 percent of their votes for Democratic candidates in general elections, while white voters usually cast about 60 to 70 percent of their votes for Republican candidates, the Democratic vote in a precinct will usually exceed the black voter percentage in the precinct. If the thesis of Professor Peterson is true, one would find that all African-American population majority precincts would be assigned to District 12 along with all non-African-American majority precincts where an African-American Democratic candidate carried the precinct in a recent election. As I will demonstrate below, the former occurred, but the latter did not always occur. This analysis will further demonstrate the power of the racial explanation and debunk the political explanation for the boundaries of Congressional District 12.

64. To examine the proposition outlined above, I have examined the assignment of precincts within the six counties of Congressional District 12, looking alternatively at assignment by race and by political preferences. I have constructed a set of **[*55]** tables which cross-tabulate the racial makeup of the population of each precinct by county with the Democratic registration percentage, the percentage of support for Democrat Harvey Gantt in the 1990 U.S. Senate contest, and the percentages of support for the Democratic candidates for Lieutenant Governor and Court of Appeals Judge in the 1988 general election. This cross-tabulation will reveal that all

African-American majority population precincts are assigned to District 12 from the six counties and that many of the precincts carried by Democratic candidates in the two contests of 1988 and the one contest of 1990 were not necessarily assigned to District 12.

65. These results are displayed in Table 6 for each of the six counties and for Congressional District 12 as a whole. All four Davidson County precincts more than 30 percent African-American are in Congressional District 12. The weakest support for a racial explanation comes from the 1990 Gantt table as four of the five precincts in which he polled a majority were placed in Congressional District 12. Charlotte's former mayor ran poorly in Davidson County, being held below 30% of the vote in 23 of the 41 precincts. Table 6 for Davidson County also demonstrates that most of the precincts less than 30 percent African-American in population but in which most voters are registered Democrats were excluded from Congressional District 12. Analyses of the contests for lieutenant governor and Court of Appeals show that no precinct in which the population was less **[TABLE 6 relocated to 357-360] [*70]** than 30 percent African-American but which cast more than 60 percent of their ballots for the Democratic candidate are in Congressional District 12.

66. I next turn to the Table 6 portion for Forsyth County. Table 6 for Forsyth County shows that all precincts at least 50 percent African-American in total population are included in Congressional District 12 for each of the measures of

Democratic strength considered. Once the African-American population percentage drops below 50 percent, then regardless of the Democratic strength registered in the precinct, there is no guarantee that the precinct will be assigned to Congressional District 12. As further evidence that race is more important than party when sorting precincts between Congressional District's 5 and 12 in Forsyth County, if the population is less than 40 percent African-American, then regardless of how concentrated Democratic strength may be, it is highly unlikely that the precinct will be included in Congressional District 12.

67. I next turn to the Table 6 portion for Guilford County. All 17 majority African-American Guilford County precincts are in Congressional District 12. However a number of precincts that are majority Democratic on the various measures are outside Congressional District 12. The contrast is pronounced in terms [*71] of party registration where three-fourths of the precincts 50 - 59.99 percent Democratic by registration are in Congressional District 6 rather than Congressional District 12. Even in the 60 - 69.99 percent registration range, most precincts are excluded from Congressional District 12. Similarly with the Gantt vote in 1990, 18 of 22 precincts in which Gantt got 50 - 69.99 percent of the vote are outside Congressional District 12. The pattern repeats with the other two sets of election data. All of the heavily black population precincts are in Congressional District 12 while only some of the heavily Democratic precincts are included.

68. I next turn to the Table 6 portion for Iredell County. All three Iredell County precincts more than 30 percent African-American in population are in Congressional District 12 while 15 of 21 precincts less than 30 percent African-American are in Congressional District 10. The strongest evidence of a racial explanation comes from the party registration analysis where 13 of the 19 precincts less than 30 percent African-American black but majority Democratic in registration are excluded from Congressional District 12. The party explanation is best supported by the 1990 Gantt analysis in which the only four precincts carried by the African-American candidate are in Congressional District 12. Despite all but two precincts having [*72] Democratic registration majorities, no more than four precincts ever cast a majority of their votes for Democrats. If I lower the threshold to 40 percent support for a Democrat, results for the Gantt and the Court of Appeals contests would support a racial explanation.

69. I next turn to the Table 6 portion for Mecklenburg County. All 34 Mecklenburg County precincts more than 30 percent African-American are in Congressional District 12! In contrast, of the 99 precincts less than 30 percent African-American, 82 are in Congressional District 9. This alone suggests that race played an very important role in selecting precincts for Congressional Districts 9 and 12. The tables for Democratic registration and support for Gantt in 1990 fit best with an interpretation that race was more important than party since in both of these presentations, the bulk of the 30 - 39.9% black precincts in which Democratic strength is in the 50 - 59.9 percent range are excluded from Congressional District 12.

Focusing on the Gantt vote in 1990, the bulk of the 30 - 39.9 percent African-American precincts in which he polled 60 - 69.9 percent of the vote are outside Congressional District 12. The 1988 Court of Appeals vote provides the strongest support for a party explanation for districting. If, however, I include precincts in which Democratic strength is 40 - 49.9 percent, then [*73] most of the precincts are in Congressional District 9, for all four measures of partisanship.

70. I next turn to the Table 6 portion for Rowan County. Rowan County has only three majority African-American population precincts (all more than 70 African-American) and these are assigned to Congressional District 12. The majority-white precincts in Congressional District 12 tend to be the ones with the strongest support for Democrats. Every precinct that gave Gantt in 1990 a majority is in Congressional District 12 and all but one precinct that voted Democratic for lieutenant governor or court of appeals in 1988 is in Congressional District 12. The strongest evidence for the racial explanation comes from the registration data where most of the precincts 50 - 69.9 percent Democratic in registration are not in Congressional District 12. If I drop the threshold down to 40 percent Democratic on each measure, then in the 40 - 49.9 percent Democratic category, most precincts are excluded from Congressional District 12 on each of the four measures.

71. Finally, I turn to the Table 6 portion for all six counties combined in Congressional District 12. District-wide all African-American population majority precincts are assigned to District 12. On the other hand, a large number of

precincts [*74] which demonstrated their willingness to support Democratic candidates in the 1988 and 1990 general elections irrespective of the race of the Democratic candidate are assigned to adjacent districts and not Congressional District 12. For example, 60 of the 98 white majority precincts won by Harvey Gannt in 1990 were assigned to another district. If the motivation was to create a Democratic majority Congressional District 12 which was hospitable to an African-American Democratic candidate in the 1990 U.S. Senate contest, a large proportion of favorable turf is not included in the district. A partisan district would have attempted to include a majority of those precincts and paid less attention to race in the construction of the district.

72. Of course, no Congressional election was conducted within the boundaries of Congressional District 12 in the 1997 plan under challenge as this court invalidated that plan. However, assuming that the challenged district is similar to the 1998 plan used in the 1998 elections, then if the objective behind the 1997 plan was to maintain a partisan balance in the congressional delegation with six Democrats and six Republicans, the effort failed. In 1998, the election of Robin Hayes in Congressional District 8 gave Republicans a 7 - 5 edge in the delegation. The election of a Republican upon the retirement of Bill Hefner in district 8 had been widely expected so the only [*75] surprise was the smallness of the Hayes' margin. Congressional District 8 is rated highly competitive by The Almanac of American Politics and a close race is expected if the 1998 plan is used for that district. Congressional District 12 in the 1997 plan shares part of its boundary with

Congressional District 8 so that potentially Congressional District 8 could have been made more Democratic and Congressional District 12 less Democratic as a step toward insuring that Congressional District 8 not go Republican after Hefner's departure. Information included by Professor Peterson at paragraph # 21 of his affidavit indicates that Congressional District 12 was at least 62 percent Democratic in the 1997 plan. A plan motivated by a desire to maintain six Democratic districts would have taken steps to shore up Congressional District 8 and the opportunity for doing so existed if Congressional District 12 were made less Democratic, i.e. fewer Democratic votes would be wasted.

* * *

[*78] V. VOTER PARTICIPATION RATES WITHIN THE GEOGRAPHY OF CONGRESSIONAL DISTRICTS 1 AND 12

76. In order to address the question of whether African-American persons within the boundaries of Congressional Districts 1 and 12 of 1997 have less opportunity than white persons to participate in the political process, I have estimated participation rates for selected Democratic primary, Democratic runoff, and general elections between 1990 and 1998 to determine the patterns of participation among the two.

* * *

[*79] 77. I present a summarization of these results in Table 7 for Democratic primary and runoff elections of the 1990s (see Exhibits C and D for summaries of the regression and extreme case analyses for the elections examined). In all five contested Democratic primary and runoff elections held within the geographical areas of 1997 Congressional Districts 1 and 12, African-American persons who were registered to vote had a participation advantage over white registered voters, based on weighted regression analyses (see Table 7). So on ten separate occasions African-American voters participated at higher rates than white voters.

78. I present a summarization of these results in Table 8 for general elections of the 1990s. In all six contested general elections held within the geographical areas of 1997 Congressional Districts 1 and 12, the African-American participation rate was lower for persons who were registered to vote compared to white registered voters, based on weighted **[TABLE 7 relocated to 361ja: TABLE 8 relocated to 363ja; TABLE 9 relocated to 365ja]** **[*82]** regression analyses (see Table 8). Thus, on the 12 separate occasions I have analyzed African-American voters participated at lower rates than white voters. This means that in general elections African-American voters must make electoral coalitions with white voters in order to elect Democratic candidates to congressional office using 1997 Plan A. In the next section, I will assess the degree of white cross-over voting in the same elections where I have estimated participation rates of the two groups.

V. WHITE CROSS-OVER VOTING IN NORTH CAROLINA

79. I examine whether white voters in the northeast and Piedmont regions of the state of North Carolina in particular cross-over and give support to candidates of choice of African-American voters in recent general elections. If white cross-over voting is common in the parts of the state where Congressional Districts 1 and 12 were created in the 1997 plan, this information might have been taken into account by the architects of the North Carolina congressional districting plan under challenge. In order to address this question, I will first report upon estimated white crossover rates using bivariate ecological regression and extreme case (homogeneous precinct) analysis for the selected statewide general election contests of 1990, 1992, 1996, and 1998 held within the boundaries of challenged Congressional Districts 1 and 12 adopted in 1997. **[*83]** Second, I will report upon estimated white cross-over rates for the 1998 Congressional elections held within the boundaries of the districts ordered by the courts in 1998.

80. In Table 9, I report my estimates of white cross-over voting in the 1990 contest for U.S. Senate involving the candidacy of African-American Douglas Wilder, in the 1990 contest for State Auditor involving the candidacy of African-American Bill Campbell, in the 1996 U.S. Senate and State Auditor contests involving candidates Gantt and Campbell, and in the 1998 contest for the U.S. Senate where John Edwards was the candidate of choice of African-American voters. I conducted bivariate ecological regression and extreme case

analyses of these elections. In both Congressional Districts of the 1997 plan, African-American candidates obtained appreciable levels of white cross-over support. The levels are white cross-over support are the highest in District 12 and somewhat lower in District 1 for at least the two elections involving Harvey Gantt. Gantt is estimated to have received a low of 17.9 percent of the white vote in 1990 in District 1 and a high of 37.7 percent of the white vote in district 12 based upon the weighted regression analyses. White cross-over was the highest in the two general election contests of 1992 and 1996 in District 1 for State Auditor. And John Edwards obtained between 35 and 40 percent of the white vote in his successful challenge to former Senator Faircloth in the Districts 1 and 12 in the 1998 general election.

[*85] 81. In Table 10, I report my estimates of white cross-over voting in the 1998 Congressional elections contests in Districts 1 and 12. In the 1998 contest in District 1 Eva Clayton was the African-American Democratic candidate, while in District 12 Mel Watt was the African-American candidate. I conducted bivariate ecological regression and extreme case analyses of these elections. In both Congressional Districts of the 1998 plan, African-American candidates obtained appreciable levels of white cross-over support. The levels of white cross-over support are slightly higher in District 12 than in District 1, but both estimates exceed 30 percent white cross-over support. These levels of white cross-over support along with African-American voter support translated into strong margins of victory for the Democratic candidates in the two districts.

VII. ELECTORAL SAFENESS OF CONGRESSIONAL DISTRICTS 1 AND 12

82. To assess the electoral safety of Congressional Districts 1 and 12 in the North Carolina Congressional districting plan of 1997, I use electoral history included in the 1998 reports of plaintiffs' expert Lee Mortimer and defendants' expert David W. Peterson as well as reconstituted election results for a number of recent statewide elections. In my scholarly work on state legislative elections, I consider any election in which one candidate gets 60 percent or more of the total vote among two candidates as being a non-competitive **[TABLE 10 relocated to 367ja]** **[*87]** election. Elections won by less than 60 percent are considered competitive. Students of congressional elections generally adopt the same threshold for distinguishing non-competitive from competitive elections.

83. Using electoral history data from the Peterson report for Congressional district 12, I find that within the boundaries of the district that Peterson estimates that Democratic candidates won over 60 percent of the vote in two 1988 elections and the 1990 U.S. Senate election between Jesse Helms and Harvey Gantt. All of these percentages exceed the level needed to have a competitive Congressional district. These three percentages all confirm that district 12 is overly safe for both white and African-American candidates of the Democratic party in general elections.

* * *

85. I have also reconstituted the precinct election returns **[*88]** from nine recent statewide elections: the 1990 U.S. Senate Democratic primary, runoff, and general elections; the 1992 State Auditor Democratic primary and general elections; the 1996 U.S. Senate and State Auditor general elections; and the 1998 U.S. Senate Democratic primary and general elections. By allocating the precincts within Districts 1 and 12 to both the 1997 and 1998 plans, I can determine how the various statewide candidates would have performed within the two sets of districts. These results are summarized in Exhibit E. Candidates of choice of African-American voters are winning the Democratic primaries or runoffs within both districts of both plans. And candidates of choice of African-American voters are usually winning more than 60 percent of the vote in the general elections within both districts under both plans. These analyses suggest that neither the 1997 nor the 1998 plan is narrowly tailored.

CONCLUSION

86. On the basis of my above analysis, I conclude:

1) that race was the predominant factor used by the state of North Carolina to draw the boundaries of the 1997 U.S. Congressional districts;

(2) that the state of North Carolina in creating the 1997 U.S. Congressional districting plan subordinated traditional race-neutral districting principles, such as compactness, contiguity, respect for political **[*89]** subdivisions or

communities defined by actual shared interests, to racial considerations;

(3) that the political explanation for the Plan A Congressional districts adopted in 1997 offered by state defendants and their expert Professor Peterson is flawed and can be characterized as a post-hoc rationalization for the districting plan;

. . . .

(5) that African-American voters residing in Districts 1 and 12 in the Act 586 plan of 1997 do not participate at lower rates than white voters in recent state-wide Democratic primary and runoff elections, indicating any evidence that a history of official discrimination has not led to politically significant differences in political participation in Democratic primary elections in the districts as drawn in 1997 (there are participation differences between African-American and white voters in general elections held within the two districts of the 1997 plan, indicating that candidates of choice of African-American voters will need some white cross-over support to win within the two **[*90]** districts;

(6) that more than sufficient levels of white crossover voting exists in the northeast and Piedmont regions of North Carolina such that fair U.S. Congressional districts can be drawn that do not need to be majority African-American in voting age population or voter registration in order to allow African-American voters a

reasonable opportunity to elect candidates of choice in U.S. Congressional elections; and

(7) that U.S. Congressional Districts 1 and 12 in the 1997 North Carolina plan are overly safe from the standpoint of giving a candidate of choice of African-American voters an opportunity to be elected, thus questioning whether the plan was narrowly tailored to satisfy a compelling state interest.

I declare under the penalty of perjury that the foregoing Declaration is true and correct.

Executed on this tenth day of September, 1999.

/s/ Ronald E. Weber, Ph.D.

[This page left intentionally blank.]

TABLE 1
(EXCERPTS)

Proportion of Total Population in Split Counties
by Congressional District for 1997 Plan (HB 586--Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Beaufort	1	23,714	14,659	61.8	8,948	37.7
Craven	1	25,279	14,207	56.2	10,920	43.2
Granville	1	20,717	10,480	50.6	10,106	48.8
Jones	1	8,553	5,045	59.0	3,461	40.5
Lenoir	1	31,016	11,887	38.3	18,959	61.1
Person	1	21,001	13,436	64.0	7,307	34.8
Pitt	1	49,584	23,676	47.7	25,373	51.2
Washington	1	10,750	5,499	51.2	5,207	48.4
Wayne	1	36,323	17,110	47.1	18,781	51.7
Wilson	1	43,517	21,008	48.2	22,181	51.0
Granville	2	17,628	12,589	71.4	4,803	27.2
Sampson	2	22,745	14,114	62.1	7,985	35.1
Wake	2	185,642	118,648	63.9	62,515	33.7
Wilson	2	22,544	19,615	87.0	2,715	12.0
Beaufort	3	18,569	14,290	76.9	4,246	22.9
Craven	3	56,334	44,453	78.9	10,196	18.1
Jones	3	861	642	74.6	216	25.1
Lenoir	3	26,258	22,435	85.4	3,580	13.6
Pitt	3	58,340	46,967	80.5	10,548	18.1
Washington	3	3,247	2,057	63.4	1,159	35.7
Wayne	3	68,343	52,062	76.2	15,012	22.0

TABLE 1 (Ctd.)
Proportion of Total Population in Split Counties by Congressional District for 1997 Plan (HB 586 - - Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Chatham	4	29,239	22,800	78.0	6,112	20.9
Person	4	9,179	7,304	79.6	1,799	19.6
Wake	4	237,738	205,363	86.4	25,548	10.7
Alamance	5	79,976	60,647	75.8	18,544	23.2
Forsyth	5	206,766	181,381	87.7	22,997	11.1
Alamance	6	28,237	25,726	91.1	2,278	8.1
Chatham	6	9,520	6,623	69.6	2,733	28.7
Davidson	6	59,993	57,135	95.2	2,468	4.1
Guilford	6	211,363	186,331	88.2	21,541	10.2
Rowan	6	77,499	70,819	91.4	5,979	7.7
Cumberland	7	127,913	94,213	73.7	27,363	21.4
Robeson	7	81,548	29,364	36.0	17,204	21.1
Sampson	7	24,552	16,159	65.8	7,701	31.4
Cumberland	8	146,653	75,856	51.7	60,133	41.0
Robeson	8	23,631	8,622	36.5	8,981	38.0
Mecklenburg	9	292,808	264,604	90.4	21,026	7.2
Iredell	10	54,472	48,438	88.9	5,526	10.1

TABLE 1 (Ctd.)
Proportion of Total Population in Split Counties by Congressional District for 1997 Plan (HB 586 - - Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Davidson	12	66,684	56,161	84.2	9,846	14.8
Forsyth	12	59,112	15,537	26.3	43,105	72.9
Guilford	12	136,057	63,253	46.5	70,114	51.5
Iredell	12	38,459	28,769	74.8	9,343	24.3
Mecklenburg	12	218,625	100,047	45.9	113,442	51.9
Rowan	12	33,106	21,032	63.5	11,794	35.6

[This page left intentionally blank.]

TABLE 2

Proportion of Total Population in Split Counties
by County for 1997 Congressional Districting Plan
(HB 586--Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Alamance	5	9,976	60,647	75.8	18,544	23.2
Alamance	6	28,237	25,726	91.1	2,278	8.1
Beaufort	1	23,714	14,659	61.8	8,948	37.7
Beaufort	3	18,569	14,290	76.9	4,246	22.9
Chatham	4	29,239	22,800	78.0	6,112	20.9
Chatham	6	9,520	6,623	69.6	2,733	28.7
Craven	1	25,279	14,207	56.2	10,920	43.2
Craven	3	56,334	44,453	78.9	10,196	18.1
Cumberland	7	127,913	94,213	73.7	27,363	21.4
Cumberland	8	146,653	75,856	51.7	60,133	41.0
Davidson	6	59,993	57,135	95.2	2,468	4.1
Davidson	12	66,684	56,161	84.2	9,846	14.8
Forsyth	5	206,766	181,381	87.7	22,997	11.1
Forsyth	12	59,112	15,537	26.3	43,105	72.9
Granville	1	20,717	10,480	50.6	10,106	48.8
Granville	2	17,628	12,589	71.4	4,803	27.2

TABLE 2 (Ctd.)

Proportion of Total Population in Split Counties
by County for 1997 Congressional Districting Plan
(HB 586--Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Guilford	6	211,363	186,331	88.2	21,541	10.2
Guilford	12	136,057	63,253	46.5	70,114	51.5
Iredell	10	54,472	48,438	88.9	5,526	10.1
Iredell	12	38,459	28,769	74.8	9,343	24.3
Jones	1	8,553	5,045	59.0	3,461	40.5
Jones	3	861	642	74.6	216	25.1
Lenoir	1	31,016	11,887	38.3	18,959	61.1
Lenoir	3	26,258	22,435	85.4	3,580	13.6
Mecklenburg	9	292,808	264,604	90.4	21,026	7.2
Mecklenburg	12	218,625	100,047	45.9	113,442	51.9
Person	1	21,001	13,436	64.0	7,307	34.8
Person	4	9,179	7,304	79.6	1,799	19.6
Pitt	1	49,584	23,676	47.7	25,373	51.2
Pitt	3	58,340	46,967	80.5	10,548	18.1
Robeson	7	81,548	29,364	36.0	17,204	21.1
Robeson	8	23,631	8,622	36.5	8,981	38.0

TABLE 2 (Ctd.)

Proportion of Total Population in Split Counties
by County for 1997 Congressional Districting Plan
(HB 586--Plan A)

County/City	CD	Total	White	%	African-Amer.	%
Rowan	6	77,499	70,819	91.4	5,979	7.7
Rowan	12	33,106	21,032	63.5	11,794	35.6
Sampson	2	22,745	14,114	62.1	7,985	35.1
Sampson	7	24,552	16,159	65.8	7,701	31.4
Wake	2	185,642	118,648	63.9	62,515	33.7
Wake	4	237,738	205,363	86.4	25,548	10.7
Washington	1	10,750	5,499	51.2	5,207	48.4
Washington	3	3,247	2,057	63.4	1,159	35.7
Wayne	1	36,323	17,110	47.1	18,781	51.7
Wayne	3	68,343	52,062	76.2	15,012	22.0
Wilson	1	43,517	21,008	48.2	22,181	51.0
Wilson	2	22,544	19,615	87.0	2,715	12.0

[This page left intentionally blank.]

TABLE 3

Proportion of Total Population in Split Municipalities and Census Designated Places by Congressional District for 1997 Plan (HB 586--Plan A)

City/Town	CD	Total	Non-Af. Amer.	%	African-Amer.	%
Ayden	1	4,590	2,186	47.6	2,404	52.4
Battleboro*	1	280	99	35.4	181	64.6
Fremont	1	1,638	784	47.9	854	52.1
Goldsboro	1	25,734	9,833	38.2	15,901	61.8
Greenville	1	19,249	6,052	31.4	13,197	68.6
Kinston	1	16,328	2,968	18.2	13,360	81.8
New Bern	1	13,921	7,201	51.7	6,720	48.3
Rocky Mount*	1	17,057	2,584	15.1	14,473	84.9
Sharpsburg*	1	482	91	18.9	391	81.1
Trent Woods	1	299	299	100.0	0	0.0
Washington	1	9,073	4,915	54.2	4,158	45.8
Whitakers*	1	464	183	39.4	281	60.6
Wilson	1	26,127	9,355	35.8	16,772	64.2
Battleboro*	2	167	156	93.4	11	6.6
Clinton	2	7,313	4,024	55.0	3,289	45.0
Garner	2	3,008	2,232	74.2	776	25.8
Raleigh	2	107,979	60,848	56.4	47,131	43.6
Rocky Mount*	2	31,940	22,116	69.2	9,824	30.8
Sharpsburg*	2	1,054	861	81.7	193	18.3
Whitakers*	2	396	233	58.8	163	41.2
Wilson	2	10,803	10,249	94.9	554	5.1

TABLE 3 (Ctd.)

Proportion of Total Population in Split Municipalities and Census Designated Places by Congressional District for 1997 Plan (HB 586--Plan A)

City/Town	CD	Total	Non-Af. Amer.	%	African-Amer.	%
Ayden	3	150	150	100.0	0	0.0
Fremont	3	72	10	13.9	62	86.1
Goldsboro	3	14,975	11,562	77.2	3,413	22.8
Greenville	3	25,723	23,583	91.7	2,140	8.3
Kinston	3	8,967	7,712	86.0	1,255	14.0
Mount Olive*	3	4,581	2,177	47.5	2,404	52.5
New Bern	3	3,442	2,599	75.5	843	24.5
Surf City*	3	317	314	99.1	3	0.9
Trent Woods	3	2,067	2,067	100.0	0	0.0
Washington	3	2	2	100.0	0	0.0
Garner	4	11,959	10,102	84.5	1,857	15.5
Mebane*	4	485	420	86.6	65	13.4
Raleigh	4	99,973	89,744	89.8	10,229	10.2
Burlington	5	36,339	27,580	75.9	8,759	24.1
Elkin*	5	3,720	3,373	90.7	347	9.3
Gibsonville*	5	1,480	1,332	90.0	148	10.0
Graham	5	7,234	5,857	81.0	1,377	19.0
High Point	5	6	6	100.0	0	0.0
Kernersville	5	10,836	10,230	94.4	606	5.6
Mebane*	5	4,269	3,382	79.2	887	20.8
Winston-Salem	5	89,215	74,885	83.9	14,330	16.1

TABLE 3 (Ctd.)

Proportion of Total Population in Split Municipalities and Census Designated Places by Congressional District for 1997 Plan (HB 586--Plan A)

City/Town	CD	Total	Non-Af. Amer.	%	African-Amer.	%
Burlington	6	3,159	3,009	95.3	150	4.7
Gibsonville*	6	1,961	1,483	75.6	478	24.4
Graham	6	3,192	2,896	90.7	296	9.3
Greensboro	6	88,441	78,981	89.3	9,460	10.7
High Point	6	37,200	32,833	88.3	4,367	11.7
Kannapolis	6	8,476	7,149	84.3	1.327	15.7
Kernersville	6	0	0	0.0	0	0.0
Lexington	6	2,885	2,522	87.4	363	12.6
Salisbury	6	5,250	4,442	84.6	808	15.4
Spencer	6	8	6	75.0	2	25.0
Thomasville	6	6,909	6,249	90.4	660	9.6
Clinton	7	891	720	80.8	171	19.2
Fayetteville	7	44,988	34,279	76.2	10,709	23.8
Mount Olive*	7	1	0	0.0	1	100.0
Red Springs	7	58	58	100.0	0	0.0
Surf City*	7	653	652	99.8	1	0.2
Fayetteville	8	30,707	12,437	40.5	18,270	59.5
Kannapolis	8	21,220	17,205	81.1	4,015	18.9
Red Springs	8	3,736	1,771	47.4	1,965	52.6
Weddington*	8	3,803	3,695	97.2	108	2.8

TABLE 3 (Ctd.)

Proportion of Total Population in Split Municipalities and Census Designated Places by Congressional District for 1997 Plan
(HB 586--Plan A)

City/Town	CD	Total	Non-Af. Amer.	%	African-Amer.	%
Charlotte	9	213,515	196,172	91.9	17,343	8.1
Cornelius	9	308	304	98.7	4	1.3
Weddington*	9	0	0	0.0	0	0.0
Davidson*	10	0	0	0.0	0	0.0
Elkin*	10	70	62	88.6	8	11.4
Mooresville	10	0	0	0.0	0	0.0
Statesville	10	12,324	9,997	81.1	2,327	18.9
Troutman	10	1,419	1,024	72.2	395	27.8
Charlotte	12	182,419	73,935	40.5	108,484	59.5
Cornelius	12	2,273	1,752	77.1	521	22.9
Davidson*	12	4,046	3,407	84.2	639	15.8
Greensboro	12	95,080	42,236	44.4	52,844	55.6
High Point	12	32,290	15,677	48.6	16,613	51.4
Lexington	12	13,696	9,143	66.8	4,553	33.2
Mooresville	12	8,818	6,687	75.8	2,131	24.2
Salisbury	12	17,837	10,521	59.0	7,316	41.0
Spencer	12	3,211	2,488	77.5	723	22.5
Statesville	12	5,243	1,290	24.6	3,953	75.4
Thomasville	12	9,006	5,246	58.3	3,760	41.7
Troutman	12	74	74	100.0	0	0.0
Winston-Salem	12	54,270	12,272	22.6	41,998	77.4

TABLE 3 (Ctd.)

Proportion of Total Population in Split Municipalities and Census Designated Places by Congressional District for 1997 Plan
(HB 586--Plan A)

*City or town is split across a county boundary.

Source: North Carolina General Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

[This page left intentionally blank.]

TABLE 4
Proportion of Total Population in Split Municipalities and Census Designated places by City or Town for 1997 Plan
(HB 586--Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Ayden	1	4,590	2,186	47.6	2,404	52.4
Ayden	3	150	150	100.0	0	0.0
Battleboro*	1	280	99	35.4	181	64.6
Battleboro*	2	167	156	93.4	11	6.6
Burlington	5	36,339	27,580	75.9	8,759	24.1
Burlington	6	3,159	3,009	95.3	150	4.7
Charlotte	9	213,515	196,172	91.9	17,343	8.1
Charlotte	12	182,419	73,935	40.5	108,484	59.5
Clinton	2	7,313	4,024	55.0	3,289	45.0
Clinton	7	891	720	80.8	171	19.2
Cornelius	9	308	304	98.7	4	1.3
Cornelius	12	2,273	1,752	77.1	521	22.9
Davidson*	10	0	0	0.0	0	0.0
Davidson*	12	4,046	3,407	84.2	639	15.8
Elkin*	5	3,720	3,373	90.7	347	9.3
Elkin*	10	70	62	88.6	8	11.4
Fayetteville	7	44,988	34,279	76.2	10,709	23.8
Fayetteville	8	30,707	12,437	40.5	18,270	59.5

TABLE 4 [cont'd]
Proportion of Total Population in Split Municipalities and Census Designated places by City or Town for 1997 Plan
(HB 586--Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Fremont	1	1,638	784	47.9	854	52.1
Fremont	3	72	10	13.9	62	86.1
Garner	2	3,008	2,232	74.2	776	25.8
Garner	4	11,959	10,102	84.5	1,857	15.5
Gibsonville*	5	1,480	1,332	90.0	148	10.0
Gibsonville*	6	1,961	1,483	75.6	478	24.4
Goldsboro	1	25,734	9,833	38.2	15,901	61.8
Goldsboro	3	14,975	11,562	77.2	3,413	22.8
Graham	5	7,234	5,857	81.0	1,377	19.0
Graham	6	3,192	2,896	90.7	296	9.3
Greensboro	6	88,441	78,981	89.3	9,460	10.7
Greensboro	12	95,080	42,236	44.4	52,844	55.6
Greenville	1	19,249	6,052	31.4	13,197	68.6
Greenville	3	25,723	23,583	91.7	2,140	8.3
High Point	5	6	6	100.0	0	0.0
High Point	6	37,200	32,833	88.3	4,367	11.7
High Point	12	32,290	15,677	48.6	16,613	51.4
Kannapolis	6	8,476	7,149	84.3	1.327	15.7
Kannapolis	8	21,220	17,205	81.1	4,015	18.9

TABLE 4 [cont'd]
Proportion of Total Population in Split Municipalities and Census Designated places by City or Town for 1997 Plan
(HB 586--Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Kernersville	5	10,836	10,230	94.4	606	5.6
Kernersville	6	0	0	0.0	0	0.0
Kinston	1	16,328	2,968	18.2	13,360	81.8
Kinston	3	8,967	7,712	86.0	1,255	14.0
Lexington	6	2,885	2,522	87.4	363	12.6
Lexington	12	13,696	9,143	66.8	4,553	33.2
Mebane*	4	485	420	86.6	65	13.4
Mebane*	5	4,269	3,382	79.2	887	20.8
Mooresville	10	0	0	0.0	0	0.0
Mooresville	12	8,818	6,687	75.8	2,131	24.2
Mount Olive*	3	4,581	2,177	47.5	2,404	52.5
Mount Olive*	7	1	0	0.0	1	100.0
New Bern	1	13,921	7,201	51.7	6,720	48.3
New Bern	3	3,442	2,599	75.5	843	24.5
Raleigh	2	107,979	60,848	56.4	47,131	43.6
Raleigh	4	99,973	89,744	89.8	10,229	10.2
Red Springs	7	58	58	100.0	0	0.0
Red Springs	8	3,736	1,771	47.4	1,965	52.6
Rocky Mount*	1	17,057	2,584	15.1	14,473	84.9
Rocky Mount*	2	31,940	22,116	69.2	9,824	30.8

TABLE 4 [cont'd]
Proportion of Total Population in Split Municipalities and Census Designated places by City or Town for 1997 Plan
(HB 586--Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Salisbury	6	5,250	4,442	84.6	808	15.4
Salisbury	12	17,837	10,521	59.0	7,316	41.0
Sharpsburg*	1	482	91	18.9	391	81.1
Sharpsburg*	2	1,054	861	81.7	193	18.3
Spencer	6	8	6	75.0	2	25.0
Spencer	12	3,211	2,488	77.5	723	22.5
Statesville	10	12,324	9,997	81.1	2,327	18.9
Statesville	12	5,243	1,290	24.6	3,953	75.4
Surf City*	3	317	314	99.1	3	0.9
Surf City*	7	653	652	99.8	1	0.2
Thomasville	6	6,909	6,249	90.4	660	9.6
Thomasville	12	9,006	5,246	58.3	3,760	41.7
Trent Woods	1	299	299	100.0	0	0.0
Trent Woods	3	2,067	2,067	100.0	0	0.0
Troutman	12	74	74	100.0	0	0.0
Troutman	10	1,419	1,024	72.2	395	27.8
Washington	1	9,073	4,915	54.2	4,158	45.8
Washington	3	2	2	100.0	0	0.0
Weddington*	8	3,803	3,695	97.2	108	2.8
Weddington*	9	0	0	0.0	0	0.0
Whitakers*	1	464	183	39.4	281	60.6
Whitakers*	2	396	233	58.8	163	41.2

TABLE 4 [cont'd]
Proportion of Total Population in Split Municipalities and Census Designated places by City or Town for 1997 Plan
(HB 586--Plan A)

City/Town	CD	Total	White	%	African-Amer.	%
Wilson	1	26,127	9,355	35.8	16,772	64.2
Wilson	2	10,803	10,249	94.9	554	5.1
Winston-Salem	5	89,215	74,885	83.9	14,330	16.1
Winston-Salem	12	54,270	12,272	22.6	41,998	77.4

*City or town is split across a county boundary.

Source: North Carolina General Assembly, Information Systems Division. All information is based on that in the General Assembly's apportionment system. Provided by Dan Frey, GIS Analyst.

[This page left intentionally blank.]

TABLE 5

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data
of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
DAVIDSON											
Thomasville No. 3 *	2910	852	29.28	2039	70.07	2100	683	32.52	1409	67.10	12
Ward No. 1 *	2777	805	28.99	1942	69.93	2055	649	31.58	1389	67.59	12
Ward No. 5 *	2448	807	32.97	1610	65.77	1678	620	36.95	1040	61.98	12
Thomasville No. 2 *	2709	1830	67.55	843	31.12	2025	1426	70.42	576	28.44	12
Thomasville No. 1 *	3417	2506	73.34	878	25.70	2685	2036	75.83	627	23.35	12
Ward No. 4 *	2403	1906	79.32	426	17.73	1910	1567	82.04	299	15.65	12
Cotton *	4475	3807	85.07	628	14.03	3251	2779	85.48	451	13.87	6
Ward No. 2 *	3114	2612	83.88	425	13.65	2405	2100	87.32	262	10.89	12
Ward No. 6 *	2896	2502	86.40	363	12.53	2300	2031	88.30	247	10.74	6
Thomasville No. 5 *	3523	3149	89.38	353	10.02	2780	2517	90.54	246	8.85	6
Thomasville No. 4 *	3377	3034	89.84	307	9.09	2539	2308	90.90	212	8.35	6
Midway *	9897	9116	92.11	751	7.59	7497	6901	92.05	570	7.60	12
Southmont *	3278	3053	93.14	202	6.16	2486	2313	93.04	158	6.36	6
Yadkin College *	619	568	91.76	37	5.98	454	418	92.07	27	5.95	12
Ward No. 3 *	2954	2684	90.86	150	5.08	2358	2188	92.79	97	4.11	12
Lexington No. 1 *	2122	2000	94.25	100	4.71	1664	1582	95.07	65	3.91	6
Holly Grove *	3586	3425	95.51	139	3.88	2763	2606	94.32	137	4.96	6
Tyro *	4023	3865	96.07	144	3.58	3035	2906	95.75	120	3.95	12
Boone *	3383	3236	95.65	121	3.58	2514	2404	95.62	93	3.70	12
Arcadia *	6400	6148	96.06	184	2.88	4762	4594	96.47	124	2.60	12
Reeds *	2353	2282	96.98	65	2.76	1848	1792	96.97	51	2.76	12
Thomasville No. 7 *	2703	2617	96.82	74	2.74	2092	2032	97.13	51	2.44	6
Welcome *	4723	4576	96.89	124	2.63	3596	3501	97.36	78	2.17	6
Abbotts Creek *	6285	6117	97.33	145	2.31	4802	4683	97.52	99	2.06	12
Hampton *	614	596	97.07	14	2.28	454	438	96.48	12	2.64	12
Central *	1381	1347	97.54	28	2.03	1129	1106	97.96	19	1.68	6

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
DAVIDSON (cont'd)											
Lexington No. 4 *	2054	2007	97.71	34	1.66	1563	1531	97.95	21	1.34	12
Lexington No. 2 *	2278	2202	96.66	34	1.49	1707	1664	97.48	19	1.11	6
Thomasville No. 10 *	3511	3446	98.15	47	1.34	2710	2657	98.04	39	1.44	6
Reedy Creek *	3563	3531	99.10	25	.70	2658	2636	99.17	16	.60	12
Silver Hill *	4658	4607	98.91	29	.62	3500	3465	99.00	20	.57	6
Thomasville No. 9 *	4841	4784	98.82	0	.41	3810	3767	98.87	16	.42	6
Thomasville No. 8 *	3811	3753	98.48	3	.34	2982	2942	98.66	7	.23	12
Liberty *	3363	3345	99.46	10	.30	2451	2437	99.43	6	.24	6
Emmons *	2467	2450	99.31	5	.20	1885	1871	99.26	5	.27	6
Silver Valley *	2579	2562	99.34	5	.19	1892	1882	99.47	3	.16	6
Alleghany *	506	506	100.00	0	0.00	400	400	100.00	0	0.00	6
Denton *	1292	1292	00.00	0	0.00	989	989	100.00	0	0.00	6
Healing Springs *	1644	1642	99.88	0	0.00	1289	1287	99.84	0	0.00	6
Jackson Hill *	790	789	99.87	0	0.00	599	598	99.83	0	0.00	6
Lexington No. 3 *	950	940	98.95	0	0.00	740	735	99.32	0	0.00	12
Total	126677	113296	89.44	12314	9.72	96357	87041	90.33	8611	8.94	
FORSYTH											
M. L. King Recreatio	3134	19	.61	3113	99.33	1972	15	.76	1955	99.14	12
14th Street Recreati	2344	12	.51	2328	99.32	1804	11	.61	1789	99.17	12
Mt. Sinai Church *	1711	20	1.17	1679	98.13	1160	16	1.38	1137	98.02	12
Ashley Middle School	2045	14	.68	2002	97.90	1460	12	.82	1429	97.88	12

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
FORSYTH (cont'd)											
Happy Hill Recreatio	3386	67	1.98	3310	97.76	2411	49	2.03	2357	97.76	12
Carver High School *	4317	104	2.41	4209	97.50	3313	92	2.78	3217	97.10	12
Kennedy Middle Schoo	3165	189	5.97	2970	93.84	2319	173	7.46	2141	92.32	12
East Winston Library	2895	197	6.80	2686	92.78	2184	185	8.47	1990	91.12	12
Lowrance Middle Scho	3102	318	10.25	2781	89.65	2222	258	11.61	1962	88.30	12
Memorial Coliseum *	2746	583	21.23	2133	77.68	2123	525	24.73	1576	74.23	12
Winston Lake Family	3662	816	22.28	2803	76.54	2619	658	25.12	1936	73.92	12
Forest Pk. Elementar	2968	745	25.10	2200	74.12	2144	619	28.87	1509	70.38	12
Forest Hill Fire Sta	3022	804	26.60	2192	72.53	2246	679	30.23	1551	69.06	12
St. Andrews United M	4101	1610	39.26	2451	59.77	2975	1335	44.87	1616	54.32	12
Easton Elementary Sc	2606	1094	41.98	1496	57.41	1885	871	46.21	1003	53.21	12
Brown/Douglas Recrea	5643	2896	51.32	2658	47.10	4647	2653	57.09	1930	41.53	5
Mineral Springs F. S	3743	2030	54.23	1653	44.16	2667	1599	59.96	1028	38.55	12
Hill Middle School *	2621	1457	55.59	1134	43.27	2000	1214	60.70	771	38.55	12
Bishop McGuinness *	2775	1571	56.61	1104	39.78	2131	1291	60.58	766	35.95	5
New Hope United Meth	4398	2758	62.71	1584	36.02	3403	2293	67.38	1073	31.53	5
Hanes Community Cent	6044	4029	66.66	1938	32.06	5473	3825	69.89	1576	28.80	5
Trinity Moravian Chu	2702	1787	66.14	858	31.75	2156	1527	70.83	588	27.27	12
Old Town Presbyteria	2860	1966	68.74	856	29.93	2247	1609	71.61	610	27.15	5
Middlefork #2 *	3449	2426	70.34	1004	29.11	2688	1961	72.95	714	26.56	5
Brunson Elementary S	2303	1630	70.78	641	27.83	1986	1448	72.91	514	25.88	5
Broadbay #2 *	4842	3671	75.82	1107	22.86	3721	2954	79.39	725	19.48	12
Middlefork #3 *	5497	4344	79.02	1121	20.39	4202	3373	80.27	805	19.16	5
Latham Elementary Sc	2855	2249	78.77	566	19.82	2332	1895	81.26	406	17.41	5
Broadbay #1 *	3128	2497	79.83	618	19.76	2494	2023	81.11	462	18.52	5
South Fork Elem Scho	3995	3254	81.45	682	17.07	3108	2615	84.14	452	14.54	5

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data
of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
FORSYTH (cont'd)											
Parkland High School	2761	2218	80.33	465	16.84	2191	1802	82.25	335	15.29	5
Christ Moravian Chur	2600	2131	81.96	404	15.54	2215	1866	84.24	302	13.63	5
Bethania #3 *	3833	3285	85.70	505	13.18	3001	2624	87.44	346	11.53	5
Old Town #3 *	2062	1785	86.57	271	13.14	1611	1418	88.02	187	11.61	5
Greek Orthodox Churc	2130	1827	85.77	278	13.05	1739	1532	88.10	188	10.81	5
Salem Chapel #2 *	2958	2540	85.87	384	12.98	2301	1984	86.22	294	12.78	5
Country Club Fire St	3451	2871	83.19	442	12.81	2753	2324	84.42	331	12.02	5
Covenant Presbyteria	2160	1856	85.93	273	12.64	1670	1489	89.16	163	9.76	5
Bethabara Moravian C	2444	2137	87.44	275	11.25	2152	1921	89.27	203	9.43	5
Bethania #2 *	3580	3173	88.63	383	10.70	2670	2392	89.59	261	9.78	5
Bethania #1 *	5274	4717	89.44	538	10.20	4098	3720	90.78	362	8.83	5
Forsyth Tech W. Camp	3122	2765	88.57	310	9.93	2597	2346	90.34	213	8.20	5
Parkway United Churc	2359	2095	88.81	228	9.67	1873	1690	90.23	157	8.38	5
First Christian Chur	1897	1683	88.72	171	9.01	1669	1469	88.02	165	9.89	5
Calvary Baptist Chur	4318	3883	89.93	386	8.94	3578	3241	90.58	296	8.27	5
Philo Middle School	2172	1976	90.98	169	7.78	1759	1622	92.21	115	6.54	5
Bible Wesleyan Churc	2619	2390	91.26	198	7.56	2136	1976	92.51	140	6.55	5
Mt. Tabor High Schoo	2242	2050	91.44	165	7.36	1783	1652	92.65	112	6.28	5
Old Town #2 *	2990	2749	91.94	215	7.19	2271	2111	92.95	144	6.34	5
Vienna #1 *	3026	2770	91.54	211	6.97	2246	2077	92.48	144	6.41	5
Old Richmond *	4694	4364	92.97	316	6.73	3556	3322	93.42	227	6.38	5
St. Anne's Episcopal	2371	2169	91.48	159	6.71	1876	1737	92.59	109	5.81	5
Belews Creek *	4357	4050	92.95	287	6.59	3227	2998	92.90	215	6.66	5
Kernersville #1 *	5482	5013	91.44	359	6.55	4234	3901	92.14	267	6.31	5
South Fork #2 *	3534	3302	93.44	191	5.40	2766	2587	93.53	145	5.24	5

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data
of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
FORSYTH (cont'd)											
South Fork #3 *	4543	4255	93.66	235	5.17	3585	3395	94.70	153	4.27	5
Kernersville #3 *	5530	5196	93.96	279	5.05	3999	3772	94.32	188	4.70	5
Vienna #2 *	3019	2861	94.77	145	4.80	2289	2186	95.50	94	4.11	5
Kernersville #4 *	5342	5046	94.46	247	4.62	4125	3925	95.15	165	4.00	5
Salem Chapel #1 *	3140	2987	95.13	138	4.39	2399	2296	95.71	91	3.79	5
Clemmonsville #3 *	3066	2892	94.32	127	4.14	2178	2058	94.49	90	4.13	5
Vienna #3 *	3405	3259	95.71	128	3.76	2525	2421	95.88	90	3.56	5
Lewisville #3 *	2694	2570	95.40	98	3.64	1993	1907	95.68	69	3.46	5
Ardmore Baptist Chur	1673	1572	93.96	59	3.53	1400	1316	94.00	51	3.64	5
Lewisville #2 *	4079	3913	95.93	134	3.29	3032	2917	96.21	92	3.03	5
Abbotts Creek #2 *	4037	3873	95.94	132	3.27	3065	2932	95.66	108	3.52	5
Bolton Swimming Cent	2889	2748	95.12	93	3.22	2390	2295	96.03	62	2.59	5
Abbotts Creek #3 *	3690	3569	96.72	108	2.93	2846	2766	97.19	72	2.53	5
Lewisville #1 *	5005	4830	96.50	140	2.80	3740	3605	96.39	109	2.91	5
Clemmonsville #2 *	3404	3286	96.53	92	2.70	2595	2514	96.88	64	2.47	5
Reynolds High School	2095	2030	96.90	56	2.67	1688	1639	97.10	43	2.55	5
Kernersville #2 *	5693	5520	96.96	122	2.14	4153	4039	97.25	82	1.97	5
Miller Park Recreati	2091	2019	96.56	44	2.10	1812	1756	96.91	36	1.99	5
Abbotts Creek #1 *	4655	4526	97.23	96	2.06	3547	3463	97.63	63	1.78	5
Trinity United Metho	2547	2479	97.33	47	1.85	2129	2075	97.46	34	1.60	5
Clemmonsville #1 *	2359	2296	97.33	43	1.82	1928	1880	97.51	31	1.61	5
Polo Park Recreation	1689	1643	97.28	30	1.78	1391	1360	97.77	21	1.51	5
Jefferson Elementary	2434	2351	96.59	36	1.48	1712	1661	97.02	26	1.52	5
Sherwood Forest Elem	972	958	98.56	6	.62	766	755	98.56	6	.78	5
Messiah Moravian Chu	1536	1506	98.05	6	.39	1195	1175	98.33	5	.42	5
Summit School *	1775	1767	99.55	1	.06	1383	1377	99.57	1	.07	5

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
FORSYTH (cont'd)											
Whitaker Elementary	2021	2010	99.46	0	0.00	1541	1532	99.42	0	0.00	5
Total	265878	196918	74.06	66102	24.86	205470	156596	76.21	46855	22.80	
GUILFORD											
GB-29 *	3067	10	.33	3056	99.64	2393	8	.33	2384	99.62	12
GB-07 *	2755	27	.98	2726	98.95	2060	26	1.26	2034	98.74	12
GB-05 *	4503	35	.78	4436	98.51	4134	33	.80	4076	98.60	12
HP-06 *	2423	34	1.40	2369	97.77	1681	22	1.31	1644	97.80	12
GB-06 *	4363	108	2.48	4228	96.91	2977	94	3.16	2863	96.17	12
GB-19 *	4006	178	4.44	3806	95.01	2744	144	5.25	2587	94.28	12
GB-30 *	2940	121	4.12	2755	93.71	2374	101	4.25	2227	93.81	12
GB-09 *	4971	271	5.45	4638	93.30	3121	217	6.95	2868	91.89	12
GB-08 *	5186	368	7.10	4799	92.54	4026	321	7.97	3692	91.70	12
HP-12 *	5416	935	17.26	4424	81.68	3697	778	21.04	2884	78.01	12
HP-07 *	2740	593	21.64	2110	77.01	1891	505	26.71	1357	71.76	12
HP-11 *	1638	351	21.43	1256	76.68	1167	308	26.39	833	71.38	12
HP-22 *	2837	835	29.43	1986	70.00	2046	662	32.36	1374	67.16	12
GB-44 *	4225	1306	30.91	2877	68.09	3087	1090	35.31	1968	63.75	12
GB-45 *	1571	487	31.00	1055	67.15	1150	381	33.13	747	64.96	12
GB-03 *	3905	1458	37.34	2363	60.51	2953	1219	41.28	1683	56.99	12
HP-05 *	4102	1710	41.69	2333	56.87	3353	1535	45.78	1776	52.97	12
GB-25 *	4292	2054	47.86	2058	47.95	3292	1712	52.00	1459	44.32	12
GB-42 *	5946	3051	51.31	2791	46.94	4494	2431	54.09	1983	44.13	12

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
GUILFORD (cont'd)											
GB-35C *	2421	1234	50.97	1050	43.37	1710	955	55.85	681	39.82	6
GB-04 *	2580	1446	56.05	1063	41.20	2182	1271	58.25	849	38.91	12
North Mad. *	2016	1252	62.10	734	36.41	1501	954	63.56	525	34.98	6
GB-33 *	5732	3832	66.85	1796	31.33	4426	3010	68.01	1347	30.43	12
GB-24A *	3192	2081	65.19	995	31.17	2528	1732	68.51	711	28.13	12
GB-26A *	3448	2371	68.76	992	28.77	2645	1885	71.27	699	26.43	12
GB-26B *	2668	1835	68.78	756	28.34	2013	1462	72.63	508	25.24	12
HP-17 *	4471	3167	70.83	1260	28.18	3426	2578	75.25	822	23.99	6
GB-01 *	4715	3281	69.59	1326	28.12	3724	2669	71.67	981	26.34	12
HP-03 *	1699	1194	70.28	474	27.90	1400	1025	73.21	351	25.07	12
GIB-G *	1961	1472	75.06	478	24.38	1454	1144	78.68	301	20.70	6
HP-15 *	2174	1612	74.15	516	23.74	1630	1300	79.75	294	18.04	12
GB-36 *	5607	4172	74.41	1303	23.24	3915	3026	77.29	797	20.36	12
GB-15 *	3811	2687	70.51	858	22.51	2951	2210	74.89	579	19.62	12
GB-23 *	5084	3672	72.23	1124	22.11	4047	3023	74.70	836	20.66	6
GB-24B *	4654	3444	74.00	1020	21.92	3754	2874	76.56	739	19.69	12
HP-18 *	4395	3337	75.93	957	21.77	3111	2573	82.71	473	15.20	6
Gibsonville *	1810	1420	78.45	384	21.22	1441	1135	78.76	300	20.82	6
GB-43 *	2666	2089	78.36	550	20.63	2162	1770	81.87	374	17.30	6
GB-02 *	3667	2817	76.82	756	20.62	3096	2440	78.81	596	19.25	12
HP-13 *	2565	1940	75.63	522	20.35	2036	1591	78.14	358	17.58	12
North Sumner *	2552	2018	79.08	498	19.51	2008	1602	79.78	381	18.97	12
HP-09 *	3103	2447	78.86	593	19.11	2434	2034	83.57	365	15.00	6
North Monroe *	2915	2338	80.21	544	18.66	2126	1697	79.82	406	19.10	6
GB-38 *	3040	2421	79.64	564	18.55	2638	2100	79.61	497	18.84	6
HP-21 *	4197	3329	79.32	765	18.23	2943	2402	81.62	474	16.11	6

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
GUILFORD (cont'd)											
South Jeff. *	3618	2949	81.51	639	17.66	2877	2356	81.89	496	17.24	6
GB-11 *	2015	1625	80.65	354	17.57	1828	1466	80.20	327	17.89	6
GB-22 *	4212	3425	81.32	692	16.43	3414	2809	82.28	535	15.67	6
GB-37B *	3299	2702	81.90	542	16.43	2810	2340	83.27	424	15.09	6
GB-32 *	2214	1765	79.72	363	16.40	1746	1391	79.67	291	16.67	6
North Jeff. *	5098	4285	84.05	775	15.20	3954	3316	83.86	608	15.38	6
GB-14 *	5417	4478	82.67	823	15.19	5307	4385	82.63	809	15.24	6
HP-10 *	2125	1711	80.52	320	15.06	1647	1393	84.58	195	11.84	12
HP-20 *	3199	2685	83.93	469	14.66	2355	1966	83.48	360	15.29	6
GB-40A *	3604	3008	83.46	517	14.35	3107	2631	84.68	414	13.32	6
GB-40B *	3120	2584	82.82	446	14.29	2346	1951	83.16	333	14.19	6
South Madison *	1742	1500	86.11	230	13.20	1303	1123	86.19	171	13.12	6
South Washington *	852	739	86.74	109	12.79	669	585	87.44	80	11.96	6
GB-10 *	2163	1836	84.88	266	12.30	1749	1499	85.71	203	11.61	6
HP-02 *	1065	921	86.48	128	12.02	939	820	87.33	107	11.40	12
GB-18 *	3276	2784	84.98	391	11.94	2537	2229	87.86	242	9.54	12
South Monroe *	5140	4489	87.33	609	11.85	3887	3449	88.73	404	10.39	6
GB-35B *	2402	2100	87.43	274	11.41	1797	1599	88.98	181	10.07	6
Whitsett *	1721	1512	87.86	192	11.16	1323	1154	87.23	159	12.02	6
Fentress-1 *	5276	4689	88.87	545	10.33	3996	3587	89.76	384	9.61	6
South Center Grove *	2407	2128	88.41	222	9.22	1802	1597	88.62	163	9.05	6
GB-17 *	3552	3021	85.05	323	9.09	3077	2673	86.87	266	8.64	6
GB-37A *	2524	2258	89.46	216	8.56	2039	1838	90.14	165	8.09	6
Stokesdale *	2134	1932	90.53	169	7.92	1640	1487	90.67	131	7.99	6
Jamestown-1 *	2606	2333	89.52	205	7.87	1971	1771	89.85	153	7.76	12
GB-27C *	2095	1906	90.98	150	7.16	1608	1486	92.41	94	5.85	6

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
GUILFORD (cont'd)											
GB-41B *	2316	2111	91.15	158	6.82	1731	1568	90.58	131	7.57	6
HP-08 *	4156	3808	91.63	272	6.54	3342	3098	92.70	190	5.69	6
Friendship-1 *	6459	5898	91.31	418	6.47	5191	4739	91.29	340	6.55	6
Oak Ridge *	2976	2751	92.44	188	6.32	2122	1960	92.37	143	6.74	6
GB-28 *	2645	2461	93.04	166	6.28	2055	1925	93.67	115	5.60	6
GB-24C *	2133	1911	89.59	132	6.19	1526	1379	90.37	95	6.23	6
GB-35A *	2056	1913	93.04	117	5.69	1503	1398	93.01	92	6.12	6
Friendship-2 *	2436	2271	93.23	128	5.25	1974	1849	93.67	98	4.96	6
North Washington *	1195	1123	93.97	56	4.69	915	867	94.75	39	4.26	6
GB-41A *	1896	1773	93.51	86	4.54	1492	1405	94.17	62	4.16	6
HP-16 *	4111	3876	94.28	185	4.50	3322	3148	94.76	140	4.21	6
GB-34A *	1567	1471	93.87	61	3.89	1159	1092	94.22	43	3.71	6
GB-34B *	2006	1894	94.42	76	3.79	1504	1425	94.75	52	3.46	6
HP-19 *	1485	1420	95.62	53	3.57	1269	1228	96.77	33	2.60	12
Bruce *	6491	6209	95.66	231	3.56	4917	4710	95.79	6 177	3.60	
North Center Grove *	1569	1511	96.30	53	3.38	1200	1154	96.17	43	3.58	6
HP-24 *	3363	3221	95.78	106	3.15	2525	2418	95.76	80	3.17	6
Fentress-2 *	4472	4296	96.06	138	3.09	3599	3481	96.72	89	2.47	6
HP-23 *	2692	2568	95.39	80	2.97	2210	2126	96.20	57	2.58	6
GB-27B *	1921	1831	95.31	57	2.97	1434	1373	95.75	40	2.79	6
HP-14 *	1323	1232	93.12	39	2.95	997	934	93.68	30	3.01	6
Greene *	2420	2338	96.61	64	2.64	1837	1773	96.52	49	2.67	6
South Sumner *	5950	5747	96.59	152	2.55	4618	4458	96.54	118	2.56	6
GB-39 *	3279	3157	96.28	82	2.50	2654	2566	96.68	56	2.11	6
Deep River *	4680	4531	96.82	116	2.48	3559	3433	96.46	106	2.98	6
GB-13 *	2533	2452	96.80	58	2.29	2163	2097	96.95	47	2.17	6

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
GUILFORD (cont'd)											
Clay *	6017	5835	96.98	124	2.06	4568	4442	97.24	84	1.84	6
GB-12 *	2897	2835	97.86	50	1.73	2287	2229	97.46	46	2.01	6
GB-16 *	3163	3075	97.22	53	1.68	2622	2555	97.44	44	1.68	6
Jamestown-2 *	4000	3901	97.53	61	1.53	3142	3073	97.80	44	1.40	12
GB-20 *	2847	2781	97.68	43	1.51	2279	2232	97.94	29	1.27	6
GB-27A *	2015	1967	97.62	21	1.04	1534	1502	97.91	16	1.04	6
HP-04 *	2759	2722	98.66	27	.98	2128	2104	98.87	17	.80	6
HP-01 *	1550	1521	98.13	15	.97	1253	1233	98.40	13	1.04	12
GB-31 *	2352	2309	98.17	21	.89	1983	1949	98.29	19	.96	6
GB-21 *	3059	3017	98.63	25	.82	2443	2412	98.73	19	.78	6
Jamestown-3 *	3726	3642	97.75	30	.81	2978	2920	98.05	20	.67	6
Total	347420	249584	71.84	91655	26.38	269704	199205	73.86	66194	24.54	
IREDELL											
Statesville #3 *	4220	1814	42.99	2373	56.23	2979	1405	47.16	1550	52.03	12
Statesville #6 *	4354	1909	43.84	2418	55.54	3079	1514	49.17	1547	50.24	12
Coddle Creek #2 *	3997	2477	61.97	1468	36.73	2943	1938	65.85	966	32.82	12
Cool Springs *	1823	1393	76.41	419	22.98	1343	1056	78.63	283	21.07	12
Turnersburg *	2392	1853	77.47	522	21.82	1817	1429	78.65	377	20.75	10
Statesville #2 *	3972	3116	78.45	758	19.08	3154	2605	82.59	486	15.41	10
Statesville #5 *	3755	3052	81.28	674	17.95	3000	2521	84.03	462	15.40	10
Statesville #4 *	3643	2999	82.32	593	16.28	2924	2486	85.02	404	13.82	10

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
IREDELL (cont'd)											
Fallstown *	5386	4499	83.53	862	16.00	4056	3471	85.58	567	13.98	10
Chambersburg *	8121	6858	84.45	1168	14.38	5943	5114	86.05	766	12.89	12
Coddle Creek #1 *	3400	2884	84.82	464	13.65	2593	2219	85.58	338	13.04	12
Statesville #1 *	3859	3269	84.71	503	13.03	3063	2671	87.20	345	11.26	10
Coddle Creek #3 *	4246	3750	88.32	458	10.79	3275	2944	89.89	306	9.34	12
Barringer *	4070	3620	88.94	435	10.69	3007	2700	89.79	297	9.88	12
Eagle Mills *	1621	1438	88.71	167	10.30	1237	1106	89.41	121	9.78	10
Concord *	4288	3981	92.84	299	6.97	3282	3050	92.93	225	6.86	10
Bethany *	5151	4759	92.39	358	6.95	3856	3551	92.09	278	7.21	10
Shiloh *	6042	5612	92.88	408	6.75	4589	4265	92.94	303	6.60	10
Sharpesburg *	2073	1971	95.08	77	3.71	1583	1506	95.14	60	3.79	10
Coddle Creek #4 *	4228	4064	96.12	140	3.31	3187	3066	96.20	100	3.14	12
Davidson *	8071	7814	96.82	214	2.65	6397	6217	97.19	154	2.41	10
Union Grove *	1672	1612	96.41	44	2.63	1246	1195	95.91	37	2.97	10
Olin *	1372	1308	95.34	33	2.41	1031	987	95.73	23	2.23	10
New Hope *	1175	1155	98.30	14	1.19	912	899	98.57	11	1.21	10
Total	92931	77207	83.08	14869	16.00	70496	59915		84.99	10006	14.19
MECKLENBURG											
Charlotte Pct. 54 *	2049	8	.39	2037	99.41	1529	3	.20	1523	99.61	12
Charlotte Pct. 55 *	2674	9	.34	2657	99.36	2073	7	.34	2061	99.42	12
Charlotte Pct. 25 *	3416	15	.44	3393	99.33	2595	12	.46	2577	99.31	12
Charlotte Pct. 56 *	5848	54	.92	5772	98.70	3888	46	1.18	3831	98.53	12

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
MECKLENBURG (cont'd)											
Charlotte Pct. 16 *	2522	32	1.27	2485	98.53	1873	24	1.28	1846	98.56	12
Charlotte Pct. 16 * (Pt)	1009	5	.50	993	98.41	719	2	.28	711	98.89	12
Charlotte Pct. 12 *	5123	89	1.74	5023	98.05	3828	74	1.93	3745	97.83	12
Charlotte Pct. 31 *	4789	129	2.69	4633	96.74	3112	115	3.70	2981	95.79	12
Charlotte Pct. 22 *	4443	174	3.92	4255	95.77	3057	167	5.46	2882	94.28	12
Charlotte Pct. 52 *	4296	166	3.86	4109	95.65	3212	135	4.20	3063	95.36	12
Charlotte Pct. 42 *	4732	349	7.38	4355	92.03	3358	305	9.08	3035	90.38	12
Charlotte Pct. 13 *	3511	235	6.69	3169	90.26	2213	223	10.08	1932	87.30	12
Charlotte Pct. 14 *	4648	321	6.91	4061	87.37	3194	268	8.39	2773	86.82	12
Charlotte Pct. 77 * (Pt)	3460	439	12.69	2987	86.33	2308	350	15.16	1928	83.54	12
Charlotte Pct. 39 *	5468	786	14.37	4496	82.22	3431	564	16.44	2753	80.24	12
Charlotte Pct. 27 *	5261	932	17.72	4231	80.42	3708	761	20.52	2874	77.51	12
Charlotte Pct. 60	3226	712	22.07	2446	75.82	2266	595	26.26	1624	71.67	12
Charlotte Pct. 17 *	3801	970	25.52	2763	72.69	2667	830	31.12	1797	67.38	12
Charlotte Pct. 82 *	6053	1647	27.21	4263	70.43	4568	1440	31.52	3013	65.96	12
Charlotte Pct. 41 *	3875	1239	31.97	2517	64.95	2672	915	34.24	1681	62.91	12
LC2	3357	1252	37.30	2098	62.50	2522	983	38.98	1534	60.82	12
Charlotte Pct. 104 *	4877	1666	34.16	3042	62.37	3433	1387	40.40	1932	56.28	12
Charlotte Pct. 11 *	3999	1502	37.56	2443	61.09	3363	1436	42.70	1890	56.20	12
Charlotte Pct. 24 *	3854	1544	40.06	2272	58.95	2811	1234	43.90	1552	55.21	12
Charlotte Pct. 23 *	3705	1659	44.78	1980	53.44	2606	1326	50.88	1237	47.47	12
Charlotte Pct. 3	4613	2018	43.75	2393	51.88	3284	1596	48.60	1555	47.35	12
Charlotte Pct. 26 *	4281	2047	47.82	2177	50.85	3010	1623	53.92	1352	44.92	12
Charlotte Pct. 78 *	5335	2534	47.50	2682	50.27	3731	1976	52.96	1680	45.03	12
Charlotte Pct. 98 *	5384	2756	51.19	2421	44.97	4094	2287	55.86	1669	40.77	12
Charlotte Pct. 40 *	4679	2579	55.12	2010	42.96	3346	2022	60.43	1259	37.63	12

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
MECKLENBURG (cont'd)											
Charlotte Pct. 28 *	3848	2262	58.78	1431	37.19	2956	1859	62.89	989	33.46	12
Charlotte Pct. 30 *	2453	1460	59.52	869	35.43	1881	1195	63.53	613	32.59	12
XMC1	924	599	64.83	324	35.06	684	453	66.23	230	33.63	12
Charlotte Pct. 46 *	4666	2850	61.08	1608	34.46	3674	2383	64.86	1135	30.89	12
Charlotte Pct. 43 *	4062	2680	65.98	1228	30.23	3054	2140	70.07	802	26.26	12
Charlotte Pct. 53 *	4582	3036	66.26	1358	29.64	3568	2507	70.26	929	26.04	12
Charlotte Pct. 97 *	5917	4066	68.72	1664	28.12	4651	3436	73.88	1080	23.22	12
Charlotte Pct. 35 *	1901	1461	76.85	424	22.30	1511	1212	80.21	287	18.99	9
Charlotte Pct. 29 *	3615	2675	74.00	781	21.60	2825	2173	76.92	538	19.04	12
Charlotte Pct. 2 *	5898	4520	76.64	1213	20.57	5118	4062	79.37	934	18.25	12
Charlotte Pct. 15 *	3816	2947	77.23	743	19.47	3085	2489	80.68	506	16.40	12
Charlotte Pct. 84 *	7719	5938	76.93	1487	19.26	6071	4839	79.71	1024	16.87	9
Charlotte Pct. 81 *	4372	3478	79.55	831	19.01	3329	2756	82.79	526	15.80	12
Charlotte Pct. 95 *	7442	5837	78.43	1400	18.81	5576	4506	80.81	927	16.62	9
Charlotte Pct. 62 *	4277	3266	76.36	799	18.68	3264	2566	78.62	550	16.85	9
Charlotte Pct. 5 *	2645	2070	78.26	488	18.45	2294	1823	79.47	404	17.61	9
Charlotte Pct. 9 *	3241	2558	78.93	559	17.25	2878	2244	77.97	521	18.10	12
Charlotte Pct. 6 *	4522	3560	78.73	775	17.14	3609	2923	80.99	549	15.21	9
COR *	706	3041	82.06	626	16.89	2743	2279	83.08	441	16.08	12
Charlotte Pct. 7 *	2460	1991	80.93	414	16.83	2088	1729	82.81	318	15.23	9
Charlotte Pct. 63 *	5113	4100	80.19	843	16.49	3933	3240	82.38	575	14.62	9
Charlotte Pct. 45 *	3673	2871	78.16	589	16.04	2922	2346	80.29	432	14.78	9
DAV *	4280	3529	82.45	669	15.63	3675	3099	84.33	510	13.88	12
Charlotte Pct. 64 *	7206	5880	81.60	1076	14.93	5978	4995	83.56	790	13.22	9
HUN *	5069	4305	84.93	725	14.30	3872	3316	85.64	524	13.53	12
Charlotte Pct. 80 *	4007	3350	83.60	568	14.18	2958	2512	84.92	384	12.98	9

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
MECKLENBURG (cont'd)											
MC2	4702	3902	82.99	664	14.12	3576	3006	84.06	475	13.28	12
Charlotte Pct. 61 *	4067	3386	83.26	573	14.09	3227	2759	85.50	398	12.33	12
MC1	6429	5344	83.12	905	14.08	4805	4055	84.39	626	13.03	12
CO2 *	10599	8831	83.32	1463	13.80	8896	7481	84.09	1176	13.22	12
Charlotte Pct. 105 *	5093	4146	81.41	672	13.19	3913	3271	83.59	447	11.42	12
Charlotte Pct. 4	4056	3438	84.76	533	13.14	3129	2704	86.42	366	11.70	9
CCK *	2241	1906	85.05	286	12.76	1675	1442	86.09	199	11.88	9
Charlotte Pct. 44 *	2155	1832	85.01	270	12.53	1707	1502	87.99	164	9.61	12
LC1 - South	843	732	86.83	103	12.22	682	591	86.66	86	12.61	12
Charlotte Pct. 79 *	2836	2449	86.35	339	11.95	2188	1931	88.25	228	10.42	9
BER *	2299	2017	87.73	271	11.79	1803	1584	87.85	211	11.70	9
Charlotte Pct. 59 *	2606	2153	82.62	307	11.78	1969	1677	85.17	196	9.95	9
Charlotte Pct. 102 *	3572	3031	84.85	412	11.53	2562	2202	85.95	268	10.46	9
PC2 *	2546	2230	87.59	293	11.51	1936	1706	88.12	214	11.05	9
Charlotte Pct. 50 *	3373	2759	81.80	388	11.50	2747	2304	83.87	272	9.90	9
Charlotte Pct. 38 *	3457	2936	84.93	397	11.48	2974	2576	86.62	299	10.05	9
Charlotte Pct. 33 *	3931	3320	84.46	439	11.17	3234	2767	85.56	335	10.36	9
SC1	5405	4645	85.94	592	10.95	3925	3462	88.20	362	9.22	9
Charlotte Pct. 34 *	3662	3163	86.37	401	10.95	3068	2725	88.82	270	8.80	9
Charlotte Pct. 21 *	3139	2683	85.47	330	10.51	2577	2282	88.55	202	7.84	9
CO1 *	1054	940	89.18	104	9.87	805	720	89.44	77	9.57	9
Charlotte Pct. 94 *	5124	4471	87.26	504	9.84	3655	3231	88.40	330	9.03	9
Charlotte Pct. 51 *	3420	2936	85.85	319	9.33	2894	2554	88.25	223	7.71	9
Charlotte Pct. 58 *	2032	1723	84.79	188	9.25	1515	1334	88.05	93	6.14	9
Charlotte Pct. 83 *	4282	3821	89.23	373	8.71	3298	2969	90.02	260	7.88	9
LC1 - North	4219	3803	90.14	337	7.99	3135	2830	90.27	256	8.17	9

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
MECKLENBURG (cont'd)											
Charlotte Pct. 87 *	4862	4400	90.50	349	7.18	3510	3206	91.34	227	6.47	9
Charlotte Pct. 10 *	2248	2006	89.23	155	6.90	1808	1647	91.10	98	5.42	9
Charlotte Pct. 85 *	3555	3209	90.27	244	6.86	2513	2291	91.17	154	6.13	9
PR1	400	370	92.50	27	6.75	289	265	91.70	23	7.96	9
MA1 *	3784	3520	93.02	201	5.31	2521	2331	92.46	151	5.99	9
MN2 *	5699	5360	94.05	277	4.86	4190	3965	94.63	174	4.15	9
PVL *	6006	5655	94.16	280	4.66	4887	4612	94.37	218	4.46	9
Charlotte Pct. 70 *	3933	3699	94.05	183	4.65	2977	2847	95.63	95	3.19	9
Charlotte Pct. 100 *	4732	4429	93.60	215	4.54	3220	3051	94.75	116	3.60	9
Charlotte Pct. 96 *	3190	2943	92.26	142	4.45	2338	2166	92.64	100	4.28	9
Charlotte Pct. 88 *	3363	3085	91.73	145	4.31	2381	2183	91.68	103	4.33	9
Charlotte Pct. 49 *	2463	2335	94.80	102	4.14	2172	2061	94.89	89	4.10	9
Charlotte Pct. 73 *	4673	4397	94.09	188	4.02	3754	3586	95.52	103	2.74	9
Charlotte Pct. 68 *	5823	5357	92.00	227	3.90	4279	3975	92.90	155	3.62	9
Charlotte Pct. 92 *	5894	5532	93.86	220	3.73	4380	4120	94.06	160	3.65	9
PR3	2865	2688	93.82	103	3.60	2049	1942	94.78	61	2.98	9
SC2	3664	3502	95.58	130	3.55	2881	2762	95.87	98	3.40	9
Charlotte Pct. 93 *	3470	3186	91.82	117	3.37	2507	2332	93.02	66	2.63	9
MA2 *	2563	2453	95.71	79	3.08	1875	1812	96.64	43	2.29	9
OAK	2537	2444	96.33	75	2.96	1984	1915	96.52	58	2.92	9
PC1 *	2417	2319	95.95	70	2.90	1851	1781	96.22	55	2.97	9
Charlotte Pct. 66 *	1899	1808	95.21	53	2.79	1540	1474	95.71	37	2.40	9
LEM *	5597	5383	96.18	152	2.72	4449	4286	96.34	123	2.76	9
PR2	3571	3415	95.63	96	2.69	2359	2249	95.34	70	2.97	9
MA3 *	5550	5301	95.51	147	2.65	4019	3862	96.09	97	2.41	9
Charlotte Pct. 65 *	4574	4294	93.88	121	2.65	3347	3164	94.53	78	2.33	9

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
MECKLENBURG (cont'd)											
Charlotte Pct. 69 *	2439	2321	95.16	62	2.54	1814	1739	95.87	42	2.32	9
MH1 *	6374	6092	95.58	159	2.49	4685	4485	95.73	118	2.52	9
Charlotte Pct. 8 *	2940	2841	96.63	72	2.45	2512	2437	97.01	51	2.03	9
Charlotte Pct. 36 *	3207	3051	95.14	75	2.34	2650	2538	95.77	62	2.34	9
Charlotte Pct. 90 *	5819	5581	95.91	130	2.23	4357	4201	96.42	82	1.88	9
Charlotte Pct. 1 *	1758	1716	97.61	39	2.22	1526	1488	97.51	35	2.29	9
MA4 *	2817	2734	97.05	59	2.09	2008	1952	97.21	37	1.84	9
Charlotte Pct. 37 *	2620	2479	94.62	52	1.98	2134	2035	95.36	32	1.50	9
Charlotte Pct. 91	3982	3841	96.46	79	1.98	2653	2571	96.91	49	1.85	9
Charlotte Pct. 76 *	4379	4199	95.89	86	1.96	3441	3329	96.75	47	1.37	9
Charlotte Pct. 57 *	2286	2224	97.29	44	1.92	1894	1845	97.41	36	1.90	9
Charlotte Pct. 67 *	1879	1828	97.29	36	1.92	1543	1508	97.73	26	1.69	9
Charlotte Pct. 47 *	2039	2000	98.09	31	1.52	1698	1665	98.06	28	1.65	9
XPR1	801	785	98.00	12	1.50	656	643	98.02	10	1.52	9
Charlotte Pct. 71 *	2318	2232	96.29	33	1.42	1753	1697	96.81	24	1.37	9
Charlotte Pct. 72 *	3896	3746	96.15	48	1.23	3027	2925	96.63	39	1.29	9
Charlotte Pct. 74 *	2720	2666	98.01	31	1.14	2231	2187	98.03	26	1.17	9
Charlotte Pct. 86 *	3452	3311	95.92	37	1.07	2444	2357	96.44	23	.94	9
Charlotte Pct. 89 *	3773	3691	97.83	38	1.01	3044	2990	98.23	27	.89	9
Charlotte Pct. 75 *	3356	3247	96.75	33	.98	2692	2618	97.25	24	.89	9
Charlotte Pct. 48 *	2092	2050	97.99	18	.86	1657	1628	98.25	11	.66	9
MH3 *	6148	6047	98.36	50	.81	4442	4363	98.22	40	.90	9
Charlotte Pct. 20 *	2124	2096	98.68	11	.52	1752	1732	98.86	9	.51	9
Charlotte Pct. 32 *	2249	2234	99.33	9	.40	1722	1710	99.30	9	.52	9
Charlotte Pct. 18 *	1851	1843	99.57	4	.22	1435	1430	99.65	3	.21	9
Charlotte Pct. 19 *	1937	1910	98.61	4	.21	1567	1547	98.72	4	.26	9

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
MECKLENBURG (cont'd)											
Charlotte Pct. 77 * (Pt)	1	1	100.00	0	0.00	1	1	100.00	0	0.00	9
XMC2 Noncontiguous	0	0	.	0	.	0	0	.	0	.	12
Sum	511433	364651	71.30	134468	26.29	387981	286959	73.96	92487	23.84	
ROWAN											
West Ward III *	2296	15	.65	2278	99.22	1738	11	.63	1726	99.31	12
Trading Ford Noncont	26	1	3.85	25	96.15	13	1	7.69	12	92.31	6
East Spencer *	2056	317	15.42	1735	84.39	1412	259	18.34	1152	81.59	12
East Ward II *	1089	292	26.81	796	73.09	824	251	30.46	572	69.42	12
Blackwelder Park *	2448	1435	58.62	1001	40.89	1736	1107	63.77	624	35.94	6
South Ward *	3659	2138	58.43	1489	40.69	2745	1787	65.10	937	34.13	12
East Ward I *	2673	1673	62.59	978	36.59	2074	1398	67.41	659	31.77	12
West Ward I *	1964	1222	62.22	702	35.74	1571	1051	66.90	496	31.57	12
North Ward I *	1750	1199	68.51	529	30.23	1473	1065	72.30	393	26.68	12
Faith Noncontiguous	67	38	56.72	20	29.85	55	32	58.18	17	30.91	6
Scotch Irish *	1347	1004	74.54	343	25.46	997	750	75.23	247	24.77	12
Cleveland *	1955	1461	74.73	485	24.81	1449	1097	75.71	348	24.02	12
Spencer *	3546	2704	76.25	815	22.98	2708	2211	81.65	483	17.84	12
Unity *	1756	1381	78.64	358	20.39	1309	1038	79.30	263	20.09	12
Milford Hills *	4680	3771	80.58	835	17.84	3667	3083	84.07	527	14.37	6
Franklin *	4589	3808	82.98	725	15.80	3545	2977	83.98	529	14.92	12
Trading Ford	1845	1543	83.63	290	15.72	1478	1226	82.95	244	16.51	6
West Ward II *	2766	2328	84.16	412	14.90	2192	1894	86.41	282	12.86	6
S. China Grove *	2362	2006	84.93	332	14.06	1791	1565	87.38	208	11.61	6

TABLE 5 cont'd

NORTH CAROLINA HB 586--PLAN A CONGRESSIONAL DISTRICTS OF 1997

Racial Composition of Total Population and Voting Age Population based on 1990 Census Data of Precincts in Split Counties by Congressional District

COUNTY/ PRECINCT NAME	TOTAL POP	WHITE POP	WHTPPCT	BLACK POP	BLKPPCT	TOTAL VAP	WHITE VAP	WHTVPCT	BLACK VAP	BLKVPCT	DIST
ROWAN - cont'd											
Sumner *	4370	3705	84.78	609	13.94	3514	2930	83.38	542	15.42	6
West Innes *	2598	2237	86.10	331	12.74	2255	1952	86.56	281	12.46	12
North Ward II *	1828	1581	86.49	230	12.58	1453	1309	90.09	132	9.08	12
West Landis *	3386	3019	89.16	330	9.75	2680	2404	89.70	252	9.40	6
Mt. Ulla *	1116	1013	90.77	103	9.23	824	755	91.63	69	8.37	6
Hatters Shop *	3584	3222	89.90	318	8.87	2700	2447	90.63	219	8.11	6
Steele *	1236	1134	91.75	102	8.25	909	832	91.53	77	8.47	6
Granite Quarry *	4194	3815	90.96	345	8.23	3102	2805	90.43	270	8.70	6
West Kannapolis *	3183	2891	90.83	220	6.91	2448	2269	92.69	131	5.35	6
Locke *	5763	5373	93.23	309	5.36	4189	3927	93.75	207	4.94	6
East Landis *	1874	1787	95.36	79	4.22	1499	1422	94.86	69	4.60	6
N. China Grove *	2944	2819	95.75	105	3.57	2224	2135	96.00	75	3.37	6
East Kannapolis *	3908	3762	96.26	132	3.38	3146	3049	96.92	89	2.83	6
Faith	2641	2540	96.18	82	3.10	1955	1882	96.27	60	3.07	6
Bostian Crossroads *	5415	5227	96.53	160	2.95	3971	3831	96.47	118	2.97	6
Bradshaw *	3004	2890	96.21	83	2.76	2212	2133	96.43	57	2.58	6
Barnhardt Mill *	1342	1306	97.32	17	1.27	1007	983	97.62	12	1.19	6
Rockwell *	3821	3763	98.48	37	.97	2817	2773	98.44	29	1.03	6
Enochville *	5688	5635	99.07	24	.42	4339	4299	99.08	16	.37	6
Morgan II *	1809	1787	98.78	5	.28	1366	1353	99.05	3	.22	6
Gold Knob *	1706	1701	99.71	4	.23	1210	1205	99.59	4	.33	6
Bostian School *	1511	1505	99.60	0	0.00	1176	1173	99.74	0	0.00	6
Morgan I *	810	803	99.14	0	0.00	636	632	99.37	0	0.00	6
Total	110605	91851	83.04	17773	16.07	84409	71303	84.47	12431	14.73	

TABLE 6
(EXCERPTS)

FORSYTH COUNTY

Precincts included in Congressional District 12 when classified by measures of Democratic strength and African-American Population

% Democratic Registration

% Black Population	50 - 59.9	60 - 69.9	> 70%
< 30%	1/32	0/5	0
30 - 39.9	0/1	½	0/1
40 - 49.9	0	0/1	2/2
50 - 59.9	0	0	2/2
60 - 69.9	0	0	0
> 70%	0	0	13/13

% Support for Harvey Gantt, 1990

% Black Population	50 - 59.9	60 - 69.9	> 70%
< 30%	0/7	0	0/1
30 - 39.9	0/2	1/1	0/1
40 - 49.9	2/2	0	0/1
50 - 59.9	0	0	2/2
60 - 69.9	0	0	0
> 70%	0	0	13/13

% Support for Democratic Lt. Governor Candidate, 1988

% Black Population	50 - 59.9	60 - 69.9	> 70%
< 30%	0/8	0/1	0
30 - 39.9	0/2	1/1	0/1
40 - 49.9	0	2/3	0
50 - 59.9	0	2/2	0
60 - 69.9	0	0	0
> 70%	0	0	13/13

% Support for Democratic Court of Appeals Candidate, 1988

% Black Population	50 - 59.9	60 - 69.9	> 70%
< 30%	0/6	0/1	0
30 - 39.9	0/2	½	0
40 - 49.9	0	2/3	0
50 - 59.9	0	1/1	1/1
60 - 69.9	0	0	0
> 70%	0	0	13/13

TABLE 6 (Ctd.)

SUMMARY FIGURES FOR ALL SIX COUNTIES IN CONGRESSIONAL DISTRICT 12

Precincts included in Congressional District 12 when classified by measures of Democratic strength and African-American Population

% Democratic Registration

% Black Population	50 - 59.9	60 - 69.9	> 70%
< 30%	30/139	18/45	1/1
30 - 39.9	1/2	8/9	4/6
40 - 49.9	0	3/6	5/5
50 - 59.9	0	2/2	8/8
60 - 69.9	0	0	9/9
> 70	0	0	48/48

% Support for Harvey Gantt, 1990

% Black Population	50 - 59.9	60 - 69.9	> 70%
< 30%	13/56	3/12	3/6
30 - 39.9	6/8	5/5	0/1
40 - 49.9	4/4	0/1	4/5
50 - 59.9	1/1	4/4	5/5
60 - 69.9	0	0	9/9
> 70	0	0	48/48

% Support for Democratic Lt. Governor Candidate, 1988

% Black Population	50 - 59.9	60 - 69.9	> 70%
< 30%	18/45	2/12	0
30 - 39.9	7/9	4/5	0/1
40 - 49.9	2/3	4/5	2/2
50 - 59.9	3/3	6/6	1/1
60 - 69.9	0	1/1	8/8
> 70	0	1/1	47/47

% Support for Democratic Court of Appeals Candidate, 1988

% Black Population	50 - 59.9	60 - 69.9	> 70%
< 30%	13/32	2/6	0
30 - 39.9	7/9	3/5	0
40 - 49.9	2/2	6/6	0
50 - 59.9	4/4	3/3	3/3
60 - 69.9	0	1/1	8/8
> 70	0	2/2	46/46

TABLE 7

Participation Rates by Race in Selected North Carolina Congressional Districts of the 1997 and 1998 Plans in Democratic Primary and Runoff Elections of the 1990s (Participation as % of Registration)

Year	CD	Office	White Partic.	Afr. Am. Partic.
1990	1	U.S. Senate (P)	.350	.385
1990	1	U.S. Senate (R)	.212	.276
1992	1	State Aud. (P)	.212	.248
1998	1	U.S. Senate (P)	.219	.198
1998	1	U.S. Cong. (P)	.128	.276
1990	12	U.S. Senate (P)	.133	.255
1990	12	U.S. Senate (R)	.097	.301
1992	12	State Aud. (P)	.098	.176
1998	12	U.S. Senate (P)	.089	.132
1998	12	U.S. Cong. (P)	.025	.065

Note: Participation rates are based on the number of voters votingfor candidates for the office in question and are estimated using weighted bivariate ecological regression analysis. Voter registration figures are used to measure the racial composition of the electorate at each election. Similar estimates were found for eachgroup using extreme case (homogeneous precinct) analysistechniques and are reported in Exhibits C and D.

[This page intentionally left blank.]

TABLE 8

Participation Rates by Race in Selected North Carolina Congressional Districts of the 1997 and 1998 Plans in General Elections of the 1990s
(Participation as % of Registration)

Year	CD	Office	Partic.	Partic.
1990	1	U.S. Senate	.620	.544
1992	1	State Aud.	.584	.493
1996	1	U.S. Senate	.606	.472
1996	1	State Aud.	.563	.423
1998	1	U.S. Senate	.447	.357
1998	1	U.S. Cong.	.405	.383
1990	12	U.S. Senate	.607	.572
1992	12	State Aud.	.653	.625
1996	12	U.S. Senate	.547	.473
1996	12	State Aud.	.503	.453
1998	12	U.S. Senate	.411	.345
1998	12	U.S. Cong.	.408	.346

Note: Participation rates are based on the number of voters votingfor candidates for the office in question and are estimated using weighted bivariate ecological regression analysis. Voter registration figures are used to measure the racial composition of the electorate at each election. Similar estimates were found for eachgroup using extreme case (homogeneous precinct) analysistechniques and are reported in Exhibits C and D.

[This page intentionally left blank.]

TABLE 9

Estimated White Cross-Over Rates in North Carolina Congressional Districts of 1997 Plan A in Statewide General Elections for 1990, 1992, 1996, and 1998
(% of Group Crossing-Over)

Year	CD	Candidate of Choice	Weighted Regression White %	Extreme Case White %
1990	1	Gantt (B)	17.9	23.0
1992	1	Campbell(B)	46.2	49.2
1996	1	Gantt (B)	22.3	25.9
1996	1	Campbell (B)	44.2	47.8
1998	1	Edwards	35.6	37.6
1990	12	Gantt (B)	37.7	32.6
1992	12	Campbell (B)	40.7	39.8
1996	12	Gantt (B)	35.1	32.1
1996	12	Campbell (B)	35.8	35.6
1998	12	Edwards	41.8	40.3

Note: The cross-over rate of white voters is estimated through the use of weighted bivariate ecological regression and extreme case (homogenous) analysis for each of the elections.

[This page intentionally left blank.]

[This page intentionally left blank.]

TABLE 10

Estimated White Cross-Over Rates in North Carolina
Congressional Districts of 1998 Plan A in
Congressional General Elections for 1998
(% of Group Crossing-Over)

Year	CD	Candidate of Choice	Weighted Regression White %	Extreme Case White %
1998	1	Clayton (B)	30.4	33.3
1998	12	Watt (B)	32.6	31.0

Note: The cross-over rate of white voters is estimated through the use of weighted bivariate ecological regression and extreme case (homogenous) analysis for each of the elections.

[This page intentionally left blank.]

EXHIBIT 58 FEBRUARY 10, 1997 E-MAIL FROM GERRY COHEN

[from:] Gerry Cohen (Bill Drafting, Director)
[date:] Monday, February 10, 1997 8:40 PM
[to:] Sen. Roy A. Cooper
[copy:] Sen. Leslie Winner
[subject:] 97 Cooper 3.0

By shifting areas in Beaufort, Pitt, Craven, and Jones Counties, I was able to boost the minority percentage in the first district from 48.1% to 49.25%. The district was only plurality white, as the white percentage was 49.67%.

This was all the district could be improved by switching between the 1st and 3rd unless I went into Pasquotank, Perquimans, or Camden. I was able to make the district plurality black by switching precincts between the 1st and 4th in Person/Franklin Counties (Franklin was all in the 1st under COOPER 3.0, but had been in the 4th District in the 80's under Price. By moving four precinct each way, I was able to boost the district to 49.28% white, 49.62% Black. About 0.6% is native American (Haliwa). I could probably improve thins a bit more by switching precincts in Granville and Franklin betwen the 1st and 4th.

I have moved Greensboro Black community into the 12th, and now need to take bout 60,000 out of the 12th. I await your direction on this. I am available Tuesday.

[This page intentionally left blank.]

EXHIBIT 100 INFORMATION SUPPORTING NORTH CAROLINA'S SECTION 5 SUBMISSION FOR ITS 1997 CONGRESSIONAL REDISTRICTING PLAN (EXCERPTS)

The following information is submitted by North Carolina in support of its request to preclear the State's new congressional redistricting plan enacted by the General Assembly on March 31, 1997. The numbered paragraphs correspond to the numbers of the rules of the Department of Justice, 28 C.F.R. §§ 51.27 and 51.28. In most cases, information documenting the information in numbered paragraphs is contained in an attachment bearing a corresponding number. (*e.g.* Paragraph 97C-27A is documented by Attachment 97C-27A).

* * *

¶97C-27H. Authority and Process for Redistricting

The North Carolina General Assembly is authorized by 2 U.S.C. §2a and §2c and Article I, §§2 and 4 of the United States Constitution to redistrict its congressional districts. The prior redistricting plan was enacted by the General Assembly on January 24, 1992, and was precleared under Section 5 of the Voting Rights Act on February 6, 1992. The United States Supreme Court declared District 12 in this plan unconstitutional in *Shaw v. Hunt* on June 13, 1996. On remand, the three-judge panel in the *Shaw* case issued an order on July 30, 1996, permitting the use of the unconstitutional plan for the 1996 elections and giving the General Assembly until April 1, 1997, to draw a new plan. Chapter 11 was

enacted in response to that order. A copy of the court order is attached as Attachment 97C-27P-2.

The process leading to the enactment of Chapter 11 began in the North Carolina House of Representatives in June, 1996. The following is a chronology of events leading up to the enactment of the plan. The designation "AA" after a name indicates that the individual is an African-American. The designation "NA" after a name indicates that the individual is a Native American:

June 13, 1996: United States Supreme Court declares District 12 unconstitutional in *Shaw v. Hunt*.

[*4]June 14, 1996: House Speaker Harold Brubaker appointed a House Select committee on Congressional Redistricting. The committee was chaired by Representative Robert Grady. The other members were as follows: Representatives Carolyn Russell, Lyons Gray, Frances Cummings (AA), George Holmes, Julia Howard, Theresa Esposito, Ed McMahan, Richard Morgan, Mary McAllister (AA), Jim Crawford, and Linwood Mercer. This Committee never met.

July 8, 1996: Senator Marc Basnight, President Pro Tempore of the North Carolina Senate, appointed a Select Committee on Redistricting. The Committee was chaired by Senator Roy Cooper. The following were also appointed as members of the Committee: Senators Charles Albertson, Frank Ballance (AA), Patrick Ballantine, Betsy Cochrane, Richard Conder, Jim

Forrester, Wib Gulley, David Hoyle, Don Kincaid, Bob Martin, Bill Martin (AA), Tony Rand, R.C. Soles, and Leslie Winner.

July 10, 1996: The Senate Select Committee on Redistricting met to discuss the *Shaw* decision and the feasibility of adopting new congressional districts in time for the 1996 general election. The Committee heard from Mr. Gary Bartlett, Executive Director of the North Carolina State Board of Elections, on the requirements for a shortened filing and primary election schedule. Senator Cooper wrote a letter to North Carolina Attorney General Michael Easley outlining the Senate's position and requesting that Attorney General Easley inform the three-judge federal panel that it was impracticable to adopt new congressional districts in time for the 1996 general election. The letter is attached as Attachment 97C-28F-4B(2).

July 17, 1996: The House Committee on Rules, Calendar, and Operations of the House released a redistricting plan (Congress-96-001) to the public. The plan is attached as Attachment 97C-27R-1. The House Committee on Rules, Calendar, and Operations of the House was chaired by Representative Richard Morgan. Its other members were as follows: Representatives Arlene Pulley, Jim Crawford, Jim Black, Joanne Bowie, Jerry Dockham, Theresa Esposito, Ed McMahan, Chuck Neely, and George Robinson. The redistricting plan was submitted by Representative Morgan to the Committee for its review, with instructions that the plan would not be voted on at that meeting. Representative Morgan read a statement to the Committee about the plan that is

attached as Attachment 97C-28F-4A and announced that there would be a public hearing the following week on redistricting.

July 19, 1996: The three judge panel issued an order asking for the opinions of Speaker Brubaker and Senate President Pro Tempore Basnight on the likelihood that the General Assembly would be able to draw a plan in time for the 1996 elections. The House was at the time and remains under the control of Republicans. The Senate was at that time and remains under the control of Democrats. The North Carolina congressional delegation, elected in 1994, was divided as follows: 8 Republicans and 4 Democrats. Senator Cooper, acting on behalf of Senate President Pro Tempore Basnight, submitted an affidavit to the Attorney General that was filed with the Court. Senator Cooper stated in his affidavit that a new plan could not reasonably be enacted for the 1996 elections. Representative Morgan, acting on behalf of House Speaker Harold Brubaker,[*5] submitted an affidavit to the Attorney General that was filed with the Court. Representative Morgan stated in his affidavit that it would be practical to redraw legislative districts in time for the 1996 elections. Senator Cooper's and Representative Morgan's affidavits are attached as Attachments 97C-28F-4B(2) and 97C-28F-4B(1), respectively.

July 24, 1996: The House Committee on Rules, Calendar, and Operations of the House conducted a public hearing in Raleigh on July 24, 1996, to hear the views of interested parties on redistricting generally and on the plan released by the Committee the week before. A copy of the notice of this public hearing, which was published in legal ads throughout the

State, distributed to the media through the media service "Xpedite," and mailed to a list of minority contacts is attached as Attachment 97C-28F-2A. The list of the media organizations contacted by Xpedite is attached as Attachment 97C-28F-4J. The list of minority contacts is attached as Attachment 97C-28H. The transcript of the hearing and sign-in sheets are attached as Attachment 97C-28F-3A. This Attachment includes exhibits submitted by the speakers at the public hearing.

July 30, 1996: The three judge panel issued an order allowing the 1996 elections to proceed under the unconstitutional plan and giving the North Carolina General Assembly until April 1, 1997, to submit a revised congressional redistricting plan to the court for its approval. The order is attached as Attachment 97C-27H-1. The General Assembly adjourned its 1999-96 session on August 3, 1996.

January 29, 1997: The North Carolina General Assembly convened its 1997-98 session on January 29, 1997. Speaker Harold Brubaker appointed a new House Committee on Congressional Redistricting. The Committee was chaired by Representative Ed McMahan. The following were named as members of the Committee: Representatives Dewey Hill, Gene Arnold, Cherie Berry, Dan Blue (AA), Joanne Bowie, Walter Church, Jim Crawford, Arlie Culp, Don Davis, Theresa Esposito, Toby Fitch (AA), Robert Grady, Lyons Gray, Thomas Hardaway (AA), George Holmes, Robert Hunter, Larry Justus, Joe Kiser, Mary McAllister (AA), Richard

Morgan, Warren Oldham (AA), Carolyn Russell, Edgar Starnes, and Ronnie Sutton (NA).

Senator Basnight reauthorized the Senate Select Committee on Redistricting. The same members appointed to the first committee were appointed to this committee (*See* July 8, 1996 entry for the names). Senator Hugh Webster was also added as a member.

February 12, 1997: The House Committee on Congressional Redistricting held its initial meeting, at which time Mr. Edwin M. Speas, Senior Deputy Attorney General, briefed the Committee on the *Shaw* litigation. Mr. Speas and Linwood Jones, Committee Counsel, answered questions of the Committee members. The transcript of this meeting is contained in Attachment 97C-28F-4E(1).

February 20, 1997: The Senate Select Committee on Redistricting met and Senator Cooper presented a congressional redistricting plan (1997 Congressional Plan A) to the Committee. This plan is attached as Attachment 97C-27R-2. Senator Cooper announced that no vote would be[*6] taken on the plan so that the public could comment on the plan at the public hearing scheduled for the following v ek. The transcript of that meeting is attached as Attachment 97C-28F-4D(2).

February 25, 1997: The House Committee on Congressional Redistricting met. Representative McMahan presented a plan to the Committee that had been drawn in response to the Senate

plan. This plan, 1997 House Congressional Plan A.1, is attached as Attachment 97C-27R-3. Representative McMahan announced that no vote would be taken on the plan so that the public could comment on the plan at the public hearing scheduled for the following week. The transcript of that meeting is contained in Attachment 97C-28F-4E(2).

February 26, 1997: The joint public hearing was held in the Legislative Auditorium in Raleigh on February 26, 1997. The transcript of the public hearing and the sign-in sheets are attached as Attachment 97C-28F-3B. Exhibits submitted by the speakers at the public hearing are included as Attachment 97C-28F-3B Ex. *See* July 24, 1996 entry for the distribution of the notice of the hearing.

February 27 - March 18, 1997: Senator Cooper and Representative McMahan met to attempt to resolve the differences between the House version of the plan and the Senate version of the plan and submitted numerous maps to each other during a four-week period of negotiations. During most of the negotiation period, the primary point of contention was how Wake County would be divided between proposed Districts 2 and 4. With one exception, none of these plans containing offers and counter-offers were released to the committees or made public. The exception is 97 House Congressional Plan G, discussed below. However, all of these plans are discussed in 97C-27R and are included in Attachment 97C-27R-12.

Senator Cooper and Representative McMahan were uncertain if they could resolve their differences regarding Wake County before the Court's April 1 deadline. They each called for meetings of their respective committees to take up their own plans. Senator Cooper introduced Senate Bill 433, containing 1997 Congressional Plan A, the same plan Senator Cooper had presented to the Committee weeks earlier. The bill was referred to the Senate Select Committee on Redistricting.

March 19, 1997: The Senate Select Committee on Redistricting met. Senator Cooper presented Senate Bill 433, containing 1997 Congressional Plan A. *See* Attachment 97C-27R-2. Senator Betsy Cochrane presented an amendment that would substitute her plan, "Congress Cochrane," for the plan offered by Senator Cooper. Senator Cochrane's plan is attached as Attachment 97C-27R-11. The Committee approved the plan presented by Senator Cooper. The transcript of this meeting is attached as Attachment 97C-28F-4D(3).

The House Committee on Congressional Redistricting also met on March 19, 1997. Representative McMahan presented a new plan to the Committee: 97 House Congress Plan G. *See* Attachment 97C-27R-4. Plan G was one of the more recent compromise proposals from Representative McMahan to Senator Cooper. Because House rules allow House committees to[*7] introduce bills, the passage of Plan G from committee in effect constituted approval to file a bill for introduction containing Plan G. The transcript of this committee meeting is attached as Attachment 97C-28F-4E(3).

March 24, 1997: Representative McMahan filed the bill containing Plan G on behalf of the Committee. The bill was given a number -- House Bill 586 -- and was referred back to the House Committee on Congressional Redistricting. Afterwards, Senator Cooper and Representative McMahan announced to their committees that negotiations would continue and that they still thought the differences could be resolved before the deadline. Senator Cooper and Representative McMahan agreed on a plan that they would each submit to their respective committees and chambers.

March 25, 1997: The plan agreed to, 97 HOUSE/SENATE PLAN (and its contingent backup plan, 97 HOUSE/SENATE PLAN 0), was presented to the House Congressional Redistricting Committee. Representative Dan Blue offered an alternative plan for the purpose of changing the proposed District 4 back to approximately its current location. The amendment was defeated by the Committee. Representative Ronnie Sutton (Native American) offered an amendment involving Robeson and Cumberland Counties that was also defeated by the Committee because he did not have statistical data showing the effect of his amendment on the population of the districts at that time. The Committee passed 97 HOUSE/SENATE PLAN as a proposed committee substitute for House Bill 586. The transcript of this meeting is attached as Attachment 97C-28F-4E(4).

March 26, 1997: House Bill 586 was reported to the House floor and was calendared for debate. Representative McMahan presented an overview of the plan to the House.

Representative Ronnie Sutton offered an amendment to move a predominantly Native American precinct in Robeson County from District 8 to District 7, where nearly all of the other predominantly Native American precincts were located. Representative McMahan had already announced in earlier remarks that he and Senator Cooper supported the Sutton amendment. The amendment passed by a vote of 117-0. Representative Mickey Michaux of Durham offered three successive amendments. These amendments represented, respectively, plans known as Fitch Michaux Plan A, Fitch/Michaux Plan B, and Fitch/Michaux Plan C. These amendments are discussed in more detail at 97C-27R and they are attached as Attachments 97C-27R-8, -9, and -10.

The committee substitute for House Bill 586 was passed, with the Sutton amendment, by a vote of 87 to 30. Of the 18 members of the House who are minorities, 5 African-American members and 1 Native American member voted for the bill and 12 African-American members voted against it. The bill was sent to the Senate. A transcript of the House floor debate is attached as Attachment 97C-28F-4F(1). (The House does not record its debates. The transcript was prepared from a recording of the entire floor debate by the University of North Carolina Public Television). The relevant portions of the House Journal are included as Attachment 97C-28F-4G(1). The record of the votes is attached as Attachment 97C-28F-4H.

[*8]March 27, 1997: The Senate Select Committee on Redistricting met to discuss House Bill 586 as it came from the House. The Committee voted for the bill. No amendments

were offered during the committee meeting. *See* Attachment 97C-28F-4D(4) for the transcript of this meeting.

The bill was considered on the floor of the Senate the same afternoon. Senator Cochrane presented an amendment containing the same plan that she had presented and that had been defeated in the Senate Committee. (*See* entry above under March 19, 1997). The amendment was defeated on the floor by a vote of 27 to 18. No other amendments were offered to House Bill 586. The bill passed by a vote of 32 to 14. All 7 African-American Senators voted for the bill. A transcript of the Senate floor debate is attached as Attachment 97C-28F-4F. The relevant portions of the Senate Journal are included as Attachment 97C-28F-4G(2). The record of the vote is attached as Attachment 97C-28F-4H.

March 31, 1997: House Bill 586 was ratified as Chapter 11 of the 1997 Session Laws.

April 1, 1997: The Attorney General filed the redistricting plan with the three-judge panel. The Attorney General also filed a motion requesting that the court delay ruling on the plan until the State had received a response from the United States Department of Justice under Section 5 of the Voting Rights Act. The Court was informed in this motion that the State would seek expedited consideration of this preclearance request.

* * *

[*9]¶97C-27M. Reason for Change

North Carolina's twelve congressional districts were redrawn to remedy a redistricting plan containing a district (District 12) that was declared unconstitutional by the United States Supreme Court in *Shaw v. Hunt*.

¶97C-27N. Effect of Change on Minority Voters

The General Assembly's primary goal in redrawing the plan was to remedy the constitutional defects in the former plan. Those defects were the predominance of race in the location and shape of District 12, and perhaps in the location and shape of District 1, and a failure of narrow tailoring. This goal was accomplished by emphasizing the following factors in locating and shaping the new districts: (1) avoidance of the division of counties and precincts; (2) avoidance of long narrow corridors connecting concentrations of minority citizens; (3) geographic compactness; (4) functional compactness (grouping together citizens of like interests and needs); and (5) ease of communication among voters and their representatives. Emphasis on these factors accomplished this goal. For example: (1) the unconstitutional plan divided 44 counties while the new plan divides only 22 counties; (2) the unconstitutional plan divided 6 counties among 3 districts while the new plan does not divide any county among 3 districts; (3) the unconstitutional plan divided 80 precincts while the new plan only divides 2 precincts; (4) the unconstitutional plan used "cross-overs," "double cross-overs" and "points of contiguity" to create contiguous districts while

the new plan uses none of these devices; (5) District 12 in the unconstitutional plan was 191 miles long (in "traveling distance") while District 12 in the new plan is only 102 miles long; and (6) District 1 in the unconstitutional plan was 225 miles long while District 1 in the new plan is only 171 miles long. In addition, the new plan makes new District 12 a highly urban district by joining together citizens in the City of Charlotte and the cities of the Piedmont Triad (Greensboro, Winston-Salem and High Point). Conversely, new District 1 is a distinctively rural district formed from the largely agrarian and economically depressed northeastern counties.

The General Assembly's other primary goal was to preserve the 6-6 partisan balance in the State's current congressional delegation. This balance reflects the existing balance between Democrats and Republicans in the State. The State House of Representatives is presently controlled by Republicans; the State Senate is presently controlled by Democrats; and most statewide elections are decided by narrow margins. It was clear from the beginning that the only plan the Senate and House would be able to agree on was one that preserved the existing 6-6 balance in the congressional delegation. At the same time, the chairmen of the Senate and House redistricting committees felt strongly that the legislature had a constitutional duty to draw a plan for the three-judge panel to review, rather than leave that task to the court. For these reasons, preservation of the existing partisan balance became a driving force in locating and shaping the districts.

These primary goals were accomplished while still providing minority voters a fair opportunity to elect representatives of their choice in at least two districts (Districts 1 and 12).**[*10]** Data and expert studies before the General Assembly provided a strong basis in evidence for the conclusion that the *Gingles* factors are present in the area generally encompassed by new District 1. *See* Attachment 97C-28F-3B and 97C-28F-3B Ex. Based on this evidence, legislative leaders concluded that avoidance of potential liability under Section 2 of the Voting Rights Act probably required the creation of a majority-minority district in that area. Accordingly, 50.27% of the total population within the District is African-American and 46.54% of the voting age population is African-American, based on 1990 census data. In addition, 1997 population projections indicate that the percentage of African-Americans and the percentage of African-American registered to vote are slightly higher in District 1 today than in 1990. *See* Attachment 97C-28A-2. These percentages plus the "cross-over" voters within the District (20 to 25%) provide African-American citizens in District 1 a reasonable opportunity to elect a candidate of their choice. This opportunity is almost certainly enhanced for the life of this plan (the 1998 and 2000 elections) by the incumbency of Eva Clayton. Congresswoman Clayton was elected from old District 1 in 1992, 1994 and 1996 with percentages of 67.0%, 61.0% and 65.9%, respectively, even though African-Americans constituted only 53% of the District's voting age population and 50.5% of the District's registered voters.

The General Assembly did not have sufficient evidence to conclude, and believes that sufficient evidence does not exist to conclude, that *Gingles* factors exist in any other area of the State so as likely to require the creation of a second majority-minority district. In *Shaw* the Supreme Court specifically rejected the State's argument that it had a compelling interest in creating a majority-minority district in the area encompassed by old District 12. Likewise, the General Assembly specifically rejected the creation of a second majority-minority district in the area eastward of Charlotte to Cumberland and Robeson Counties, as proposed for example by Senator Cochrane. Creation of any district in that area would artificially group together citizens with disparate and diverging economic, social and cultural interests and needs. It would sandwich rural voters between urban voters in the State's banking and commercial center at one end of the district and voters residing on and around Fort Bragg and Pope Air Force Base at the other end of the district. Such a district would also rely on uncertain coalitions between African-American and Native-American voters for its "majority-minority" status. Significantly, it would have thwarted the goal of maintaining partisan balance. Under these circumstances, voters could not obtain effective representation, or be effectively represented. Moreover, under these circumstances, race would have become the predominate factor, to the exclusion of the State's redistricting criteria, in the creation of a district which would bear an uncomfortable resemblance to Georgia's District 11 declared unconstitutional in *Miller v. Johnson*.

Nevertheless, District 12 in the State's plan also provides the candidate of choice of African-American citizens a fair opportunity to win election. Though not a majority-minority district, the candidate of choice of the minority community within the District will have a fair and reasonable opportunity to win election based on a combination of minority and non-minority votes. Congressman Mel Watt was elected from old District 12 in 1992, 1994 and 1996 with percentages of 70.4%, 65.8% and 71.5%, respectively. (African-American citizens constituted 53% of the voting age population and 53.5% of the registered voters of old District 12)[*11] Consistent with the General Assembly's primary goal to preserve the existing partisan balance in Congress, new District 12 contains a substantial portion of the core of the urban population of old District 12 and a substantial percentage of voters with an affinity for Democrat candidates, regardless of their race. Those factors, together with the significant African-American population in the District (46.67% total population and 43.36% voting age population) provide a fair opportunity for incumbent Congressman Watt to win election.

* * *

[*12]¶97C-27R. Other Material Concerning the Purpose of the Plan

* * *

[*16]6. Plans Discussed in Negotiations

Senator Cooper and Representative McMahan were involved in negotiations with each other for nearly three weeks in an effort to develop a plan that both the House and the Senate could agree to. These negotiations centered primarily on the division of Wake County between the 2nd and 4th districts.

Several proposed plans were exchanged during this time. The plans constituted a series of offers and counteroffers that gradually moved the Senate and House closer together. This series of changes can best be understood in light of the original plans released by both sides (1997 Congressional Plan A in the Senate and 1997 House Congressional Plan A.1 in the House) and how those plans came about.

In developing the Senate's initial plan as well as subsequent plans, Senator Cooper consulted with members of the congressional delegation and members of the Senate, particularly Senator Frank Ballance, Senator Leslie Winner, Senator Bill Martin, and Senator Marc Basnight. Senator Ballance, an African-American and the Deputy President Pro Tempore of the Senate, was consulted about the placement of counties in the northeastern part of the state -- the area in which

he resides (Warren County) -- including the location of the boundaries of the new 1st district. Senator Winner, counsel for the plaintiffs in the *Gingles* litigation in the early 1980s and a resident of Charlotte, was consulted about the composition of the 12th district, which includes much of Charlotte. Senator Martin, an African-American representing much of Greensboro and Guilford County, was consulted both as to statewide plan issues and the placement of parts of High Point and Greensboro in the 12th district. Senator Basnight, President Pro Tempore of the Senate, was consulted on the plan generally and on the placement of counties in the northeast. Senator Basnight also resides in the northeast (Dare County). Senators Basnight and Ballance together represent most of northeastern North Carolina.

The initial Senate plan was perceived by many Republicans as treating incumbent Republican congressman Walter Jones (3rd District) unfairly (*see*, for example, the comments of Representative McMahan to the House Redistricting Committee on February 25, 1997 at Attachment 97C-28F-4E(2)). The House Republicans felt that the 3rd district was perhaps their most critical district and that the Senate's proposal, especially in the 3rd district, threatened the 6-6 partisan balance. Rep. McMahan responded by releasing a plan (1997 House Congressional Plan A.1) that in many respects resembled the Senate plan. However, Rep. McMahan's plan also addressed the concerns about the 3rd district and created other intentional differences between the two plans to use as "bargaining[*17] chips" in negotiating primarily on three districts -- the 2nd, the 3rd, and the 4th.

Representative McMahan also consulted with numerous individuals, including African-American and other members of the House and Democratic and Republican members of the North Carolina congressional delegation.

Although the boundaries of the 1st District were affected by changes in the 2nd, 3rd, and 4th districts, these changes did not significantly affect the percentage of African-Americans in the 1st District. This percentage fluctuated about two-tenths of one percent as a result of this series of changes. The enacted 1st district is similar to the 1st district that was originally proposed by Senator Cooper after consultation with Senators Ballance and Basnight. As enacted, it includes more of the territory of the existing 1st district than the original House plan, thus keeping more of Congresswoman Clayton's current constituency intact in the district. At the same time, the counties in the coastal/Tidewater region (Chowan, Pasquotank, Perquimans, Currituck, and Tyrrell) are able to remain together with the coastal counties with whom they share economic and other interests.

Differences between the House and Senate plans in the 12th district were resolved quickly. The House agreed to include Winston-Salem in the 12th district in one of its first counter-offers to the Senate, recognizing that it was the only major city in the Triad area not included in the urban-based 12th district.

After the 3rd district and 12th district were resolved, the negotiations focused on the dividing line in Wake County

between the 2nd and 4th districts. The Senate considered that many of the House plans for the 2nd district were not consistent with the goal of keeping a partisan balance and the House felt that the 2nd district in the Senate plans did not reflect the partisan makeup of the prior 2nd district. This issue was the last to be resolved.

MINUTES SENATE COMMITTEE ON CONGRESSIONAL REDISTRICTING FEBRUARY 20,1997

The Senate Committee on Congressional Redistricting met on Thursday, February 20, 1997 at 11:30 a.m. A majority of members were present.

Senator Cooper: The Committee will come to order. If we can get everybody to have a seat. I know you are interested in looking at these plans. We also have plans being passed out for the public. O.K., we are about to begin. I need for you to be quiet in the back, please. Thank you.

Senator Conder: Mr. Chairman

Senator Cooper: Senator Conder

Senator Conder: We have former Representative, Allen Myer and his wife, House of Delegates, from Virginia here. Would you recognize him back in the back?

Senator Cooper: Most certainly. Thank you for coming. Glad to have you here.

Senator Cooper: Members of the Committee, the purpose of this meeting is to present to you a plan for consideration on the redrawing of the Congressional districts for the State of North

Carolina pursuant to Order of the Court. We will not vote on this plan today. I would ask that you take it home, look at it, study it. It will be available for the public, we are going to be online, it will be on the Net and I think the public information people have the web site where you can go look at this plan. We will be having a Public Hearing on Wednesday at 3:30 p.m. to get public input on the plan and on redistricting in general. I don't know at that time whether the House will have a plan [*2]available or not. But then the plan would be to, maybe the end of next week or at the latest the first of next week, to try to get the Senate to act on a plan to get it over in the House and to talk with them. Hopefully convince them that this is a good plan. If they don't think so, certainly talk with them about the situation and go from there. We are operating under a deadline of April 1st, so we definitely need to get moving.

For the elections beginning in 1992, the General Assembly drew the current Congressional districts, which you see, some of the maps around have the current districts which are up there. The General Assembly first sent a plan to the Justice Department with one minority district in the northeast. That plan was rejected by the Justice Department with the instruction that another minority district was needed in the State of North Carolina. The result was the current plan that we have now. This is an overall recap of the current plan. Currently, we have 46 counties which are split, we have six counties which have three members of Congress, an issue that the Supreme Court found particularly problematic. We have several districts with clearly irregular shapes and we have a situation where over a 100 precincts are split. Although lower

federal courts held this plan constitutional, the United States Supreme Court in a 5-4 decision declared specifically the 12th Congressional District to be unconstitutional. There are different interpretations of that decision and other decisions. The bottom line interpretation is that race cannot be the predominate factor in redistricting and that if race is used, districts must be reasonably compact. Of course, the standard of reasonably compact is open to interpretation. Quoting from the Court, the Court wrote that the standard is not the least possible amount of irregularity, but the districts must be reasonably compact and regular.

We had a challenge in trying to draw a plan and we have a challenge ahead of us. In seeking to draw a plan to present to this Committee, Plan A you have there, the following issues were considered. First, geographic fairness, second, reasonable compactness, third, communities of interest, fourth, racial fairness, five, reasonable political fairness, six, precinct boundaries, seven, county boundaries when reasonably [*3]possible, eight, the core geographic area of the current districts and their incumbents, ninth, the potential to achieve consensus within this chamber and within the House chamber and tenth, and probably most importantly, the constitutionality of the plan.

This plan took all of those factors into consideration. As a result, this plan is fair and workable. It will please everyone somewhat and no one completely. This is an overall description of the plan: First, it reduces from 46 to 24 the number of counties which are split into two Congressional

districts. There are 24 counties that are split, bringing it down from 46, cutting the number almost in half. It reduces from 6 to 0 the number of counties which have three members of Congress. As I said earlier, the Court had problems with this. Under the prior plan we had six counties with three members of Congress and now we have none. It uses as a foundation the basic core of the existing Congressional districts. No district is dramatically changed and most of the districts, if not all of the districts have become more compact. I want to go over a brief description - and you have it in your package - but a brief description of the plan as follows: Here is the first district - as you can tell from this plan, the first district went way down into what is currently the 3rd, the 7th and the 2d and intentionally sought out minority population. This district is now much more compact and it contains 50.11% minority overall population. The 2nd district is here, in the green striped, it has the basic core of the current 2nd district. The 3d district is a local district, basically as it was before. You have to have a lot of land mass when you are in the 3rd district to get 552,000 people, but that is out here. The 4th district is pretty much the Research Triangle Park. It covers all of that area with Orange, Durham County wholly in the 4th district and part of Wake County. The 5th district along this part of the state, is relatively unchanged. The 6th district here, there is not a whole lot of change to that in the Guilford County area. The 7th district down here is relatively unchanged. It moves north a little bit and one of the reasons for that is that - the main reason for that is that the 1st district had a lot of area in this - down here at the bottom of the southeast and so you had to come a little bit north to get the population. The 8th district here is relatively

unchanged. I know there a few changes, but when you make changes in one district, you pretty much have[*4] to make changes in all the areas. The 9th district here ... relatively unchanged. The 10th district here, relatively unchanged. The 11th district - much more compact. You can see it is somewhat jagged here. We used county lines to make the 11th district compact. And here the 12th district from Greensboro to Mecklenburg.

Let me talk just a little bit about the 12th district because that was the district which was held to be unconstitutional by the Court. In Congressional Plan A, I believe the 12th district is constitutional as drawn and I will tell you why. First it is much more compact. It is 67% shorter in length than the current district. You can drive it in about 2 hours - from Greensboro to Charlotte.

Senator Winner: An hour and a half

Senator Cooper: An hour and a half - well I was thinking the very southern end of Mecklenburg. Let's go back and look at the *Insider* again and check on Senator Winner. (laughter)

Senator Cooper: It is the third shortest district in the state - the only districts which are shorter in length are the 4th and the 10th. It covers 6 counties instead of the 10 counties that it covered in the past. It connects the metropolitan areas of Charlotte and the metropolitan area of the Triad. It is much wider. One of the main problems the Court had with the 12th district was that it went long stretches with not covering any people at all.....

just go down the highway and not have anybody and just have a thin point of continuity along the Interstate. Here in every place but one, the district is 2 precincts wide, at least and much more - much wider in other areas. Only one area is one precinct wide and that is a very wide precinct. It takes into consideration the incumbent and the overall political balance. It is 47.09% minority, it is not a majority/minority district, but it is a minority influenced district.

[*5]Members of the Committee, I believe that this is a fair plan. You know - there will be questions about the partisan issue. I am no fortune teller. We have some results from 1988 and 1990 races that are in the computer. We are now dealing with 7 years later. It is very difficult to tell. I believe that all 12 of the incumbents would have an excellent opportunity to win each one of these districts. We are not drawing the districts for incumbents. We are trying to draw a plan that will get 26 votes in the Senate and 61 votes in the House. And I believe that we have a plan that all 12 of the incumbents should be able to live with because we have not dramatically altered the geographic nature of their districts.

What I want to do now is open the floor for questions from the Committee and questions, comments - I shared with you previously, most of you on the Committee the Plan and I want to open the floor up for questions or discussion at this time.

Senator Cochrane: Thank you Mr. Chairman and thank you and whatever staff for the efforts that you have presented here. I have admiration for the compactness that I see in several

districts as opposed to some fingers that we saw before and certainly 12 is improved. But I do have a question - when you say that it appears to you that incumbents - your feeling is that the incumbents have a better than average chance at re-election - you think that they are well cared for here. So that brings me to the information sheet - and is maybe more for Gerry than for you - but as I go down registration of Democrats vs. Republicans, and I realize you have to go back to 1990 for these numbers, I presume that they are 1990 registration numbers. Based on the numbers, how can you even consider the possibility it is going to stay 6 to 6? Here are only two that I see where Republican registration is even close to Democrat. The numbers are pretty - there is a preponderance of Democrat registration throughout the district.

Senator Cooper: Party registration has very little relevance at all to election outcome. North Carolina is predominately registered Democratic, but if you look at election[*6] results, it's pretty obvious - particularly in eastern North Carolina - that many registered Democrats vote Republican. That's no indication at all as to political outcomes and once again, I don't want to get into the fortune telling business because, but I don't think that that is a very relevant issue.

Senator Cochrane- I do understand that the demographic, well the registration.....are not the voting pattern. Then what voting patterns would you apply that leads you to be able to say so emphatically that you think the ...

Senator Cooper: I'm not saying that emphatically and this is not - I don't want this to be called an incumbent protection plan because it is not. What we tried to do was to make each district more geographically compact, leaving the core area for each of the present districts. That means each of the incumbents are there in their core area and the districts have not changed radically to the point of affecting the past political outcome. Most of the incumbents that have won, that are there now, won by pretty handy margins.

Senator Cochrane: And you are of the opinion that that is a potential scenario in the next election?

Senator Cooper: Certainly a better than average potential scenario, yes.

Senator Cooper: Senator (William) Martin

Senator William Martin: Mr. Chairman, I would just mention following up on Senator Cochrane's question - just looking at these numbers on the basis - where if you look at the Republican representation on the current plan that does exist, you want to look at that and say that it is highly unlikely that there could be more Republicans elected under the current plan than exists when you look at those numbers. Really, the[*7] numbers are.....on the one that is proposed. I think that supports the idea that the voting patterns - patterns of voting, the trend, would be consistent with this.....

Senator Cooper: Senator Cochrane

Senator Cochrane: Let me respond to that - as for one Representative Jones certainly would not be of the same opinion that you have just offered.

Senator Cooper: Further questions from the Committee?

Senator Conder: Wonderful job Senator Cooper - we applaud you.

Senator Cooper. Senator Ballance

Senator Ballance: Mr. Chairman, I want to make a comment. I think a lot of people worked real, real hard making 1991, 92, whenever we adopted our current plan, and the Justice Department nudged us very much to get two districts where African-Americans, in my opinion, could be elected. I think I recall the results in the Atlanta races of Cynthia McKinney and ..... Bishop, where those districts were.....down to 35 or 40% African-American and they were nominated and elected. But I do have a little concern that in the 1st District, for example, we are coming up now with 44% registration. I think I got that right and because we have talked about this a little bit, but I do not object to this plan because the courts have said that they gotta be compact. At the same time, I don't want people to think that.....ecstatic about it because it will be difficult nonetheless to maintain what I consider the progress we've made in sending to Washington a delegation to represent seven million people that is, for the first time, diverse in terms of race. And I think all of us are proud of that. We may not prefer that particular person who's in that position, but I think

all of us have to be, have to say we are proud of the fact we now have a delegation in Washington, D. C. that is, as Bill Clinton is often saying, it looks more like North Carolina. And I would just hope that[*8] whatever we do with this plan that we will continue to try and look at that issue as something that is important to all of the people of North Carolina.

Senator Cooper: Senator Forrester

Senator Forrester: Thank you Senator Cooper. Was there any particular reason that your committee did not put the 12th District going east from Charlotte rather than going north, etc. and the district going more into the eastern North Carolina- for the 12th, Mel Watts district?

Senator Cooper: Number 1, that is the current incumbent's district. That's very important in being able to get this plan passed the General Assembly. Number 2, you have communities of interest along 1-85. If you go from west to east from Mecklenburg to Robinson County, I think you have a real problem with community of interest.

Senator Cooper: Senator Winner.

Senator Winner: I wasn't going to ask this - but first let me address Senator Forrester's question. From my prospective having spent a lot of time in the downtown, urban Charlotte and a fair amount of time in Union and Anson and Robinson counties, they're really different places with really different kinds of economies and really different kinds of problems and

it never has made sense to me to put them together in a district whereas Charlotte, Winston-Salem and Greensboro are much more similar in their economies and in the kind of problems that they have. But what I wanted to say, and I think it is important from a constitutional basis on this plan, is that it was my opinion that one of the most problematic things about the other plan was the number of precincts that it divided. And, that was really problematic for voters also because it was very hard for the voters in those divided precincts to know which Congressional district they were in. So I think probably the biggest improvement in this plan is that it only divides two precincts instead of dozens of precincts. And the two precincts that are divided - one of [*9]them is in Mecklenburg County and it is divided in practically everything, but there are only four people that live in the part that are divided off. It's just a particular precinct and the other one is in, I think, Washington or Beaufort -

Senator Cooper: Beaufort. It is non-contiguous.

Senator Winner: And it has some water that divides the precinct? The precinct.....

Senator Cooper: Satellite annexation.

Senator Winner: So we only divided off the part of the precinct that wasn't contiguous to the rest of the precinct? And I think that that's very - very important constitutionally, but I also think from the point of view of our constituents and the

voters being able to know where there Congress people are, that that is a very important improvement in this plan.

Senator Cooper: Follow up question for Senator Forrester.

Senator Forrester: Thank you Mr. Chairman. Is it not true when you get the numbers down in the crunch, you are going to have to divide some more precincts?

Senator Cooper: Yes, I was going to add, thank you Senator Forrester, I was going to add a caveat to that. The Supreme Court has held in a case in 1983, and Senator Ballantine and I were just talking about it, we read the case, that you have to get down to no more than one vote variance. That is a ridiculous requirement, particularly when we are working with 1990 census data. But we must do that for the plan to be constitutional. Right now this plan you have before you is just a few hundred off, but necessarily we are going to have to, when we refine the plan and get it ready for introduction, we're probably going to have to end up splitting up about ten or eleven precincts in order to make sure that the numbers come out precisely right - that there is **[*10]** not more difference than one person for each district. That is very frustrating, but that has to be done.

Senator Cooper: Senator (William) Martin.

Senator William Martin: I just want to add, Senator Warren and I were talking about it yesterday that we might also have to

do some legislation placing a moratorium on births and deaths. (laughter)

Senator Cooper: Senator Hoyle.

Senator Hoyle: Thank you Mr. Chairman. Have you had any conversation with your counterparts in the House and, if you have, do you think their plan has - bears any resemblance to ours?

Senator Cooper: I don't understand that they have a plan at this point. I know they ran a plan out last time, or last session in the summer, that does not resemble this plan. But I have talked in generalities with the House chairman, we have not talked specifics, he may be here, Ed may be here, I don't know. Oh, O.K. But it is my understanding that they would be receptive to looking at this plan and I don't think they are gonna have a plan for the public hearing. And I'll let him speak on that. Ed, would you want to say something concerning that?

Representative McMahan: We're glad to see your plan this morning ..... some very positive points on, as part of the plan. I've enjoyed the conversations I've had with Senator Cooper in trying to get this resolved. We do intend to look at this over the weekend and we are in the process of finalizing, maybe not just one plan, but actually looking at a couple of plans and I think this is an excellent start and we will certainly take this plan and factor it in to what we are looking at. And we do intend to present a, our version of the plan, probably in a committee meeting Tuesday afternoon, actually **[*11]** prior to

the hearing. But again, I see some real positive points as part of this plan and we will be able to use it in factoring it into our plan.

Senator Cooper: This is what you call an open meeting. Thank you. All right, further discussion from Committee members? Hearing none, we are adjourned.

/s/Roy A. Cooper, III
Senator Roy A. Cooper, III, Chairman

/s/Susan M. Moore
Susan M. Moore, Comm. Clerk

SECTION 97C-28F-4D(3)

MINUTES SENATE COMMITTEE ON CONGRESSIONAL REDISTRICTING MARCH 19,1997

The Senate Committee on Congressional Redistricting met on Wednesday, March 19,1997 at 4:00 p.m. in Room 1124 of the Legislative Building in Raleigh, N. C. A majority of members were present:

Sen. Cooper: Order please. Members of the Committee, we have before us Senate Bill 433. It is the same plan that was presented to the Committee at our meeting a couple of weeks ago. Let me just briefly go over some of the important points about this plan. I believe that we have strived to come into compliance with the one-person, one-vote rule. We've strived to come into compliance with the Voting Rights Act. We've strived to follow the direction of the Supreme Court to draw more geographically compact districts. We have strived to keep precincts whole. We strived to keep as many counties whole as possible having reduced the number of counties that were split from 46 in the old plan to 24 in this plan. We have strived to maintain partisan balance. We have strived to keep the core geographic areas of the current districts in place so that it will be easier to get a plan past both chambers. We have strived to keep together communities of interest, particularly looking at rural and urban interests. And we have looked at ease of communication between voters and representatives. One important issue is that under the current plan, we have six

counties which are currently represented by three members of Congress. In this plan there are no counties which will have three members of Congress and we believe that we have put forth a plan here which has the potential to achieve consensus. To talk briefly again as I did last time about the 12th Congressional District as it is the reason why we are here, the Court having held it unconstitutional. The current 12th District which we have in Plan A is more compact, much more compact. It is 67% shorter in length, you can drive it in two hours. It is the third shortest district in the state, it covers six counties instead of ten. It**[*2]** connects the metropolitan areas of Charlotte and the Triad, all with communities of interest in the 1-85 corridor. It is much wider. It is not a majority/minority district. I don't believe, certainly we can argue and don't believe that the test for the constitutionality as laid out in *Shaw v. Hunt* would even be considered because it is not majority/minority. And we have taken into consideration the current partisan nature of the 12th District which is Democratic and strived to keep it in that same partisan vein as we have the other six current Democratic districts and the other six Republican districts.

Let me tell you a little bit about the status of the negotiations with the House. This Plan A is the Senate position and the Senate position throughout has been that we need a fair and equal partisan balance. In 1996, the people spoke in an election and decided it was important to have six Republican members of Congress and six Democratic members of Congress. And I don't believe that we should use court-ordered redistricting to redraw that result. The House has come forward with a plan,

and I think they voted on it today, which does not provide for a fair partisan balance. However, we will continue to negotiate, the fact that we are moving forward with this plan today does not cut off negotiations. In fact I believe it has spurred an even greater interest in negotiations and we will continue to negotiate right up to the last minute if necessary. Hopefully reaching some type of compromise before that time. However, until we can reach a negotiated settlement, it is my opinion that we should go forward with a plan that we believe is fair and reasonable realizing that we do have room to negotiate and we will continue that process of negotiation.

At this point, I want to....to recognize Mr. Adam Stein who is here. He wanted to present some information to the Committee which we did not have at the last committee meeting, particularly concerning the Voting Rights Act as it applies to this plan. And so briefly, Mr. Stein, I would like to recognize you and to have you present remarks to the Committee.

[*3]Adam Stein: Thank you Senator Cooper. At the public hearing Anita Hodgkiss of my firm, presented a lot of material which had previously been introduced in the lawsuit which is pending and been to the Supreme Court twice. Material which we contend shows that there is a requirement on the state to adopt a plan that includes a majority/minority district in the....of the northeast portion of the state. Part of that submission was a report by Professor Richard Engstrom who is an expert in the field in analyzing of voting....for voting rights purposes. We have asked.... and he did that at the instance of the state....he was hired by the state in connection

with the litigation. We asked him to update an analysis based on the United States Senate race in 1996 between Senator Helms and Harvey Gantt to see the extent of polarized voting which still exists. He's done that. Anita Hodgkiss, I understand, sent a letter to Senator Cooper and sent copies to all of you which includes Professor Engstrom's report. His report essentially shows exactly the same kind of polarized voting which had existed in 1990, almost to the decimal. So, at this time I would like to present officially the....both the cover letter that Anita Hodgkiss sent to you Senator Cooper, as well as Dr. Engstrom's report. And I have copies if anybody wants them. I think that they were already sent to everybody. I looked at this this morning to make a little chart to see how things looked between 1990 and 1996, and it shows things exactly the same. Professor Engstrom's report also showed polarized voting in 1992 in the 1st Congressional District and the figure that struck me was that in the run-off primary between Mr. Jones and Mrs. Clayton for the Democratic nomination, Mr. Jones got 100% of the white vote and Mrs. Clayton got about 95% of the black vote. We suggest these figures show that there is polarized voting in that part of the state that is severe and requires a remedy. We think that the various plans that have been offered would address that problem and so I would give you this chart to address the Committee.

Senator Cooper: One thing that I want to point out to the Committee, that we have a difficult chore which....which requires a delicate balance here and we are charged with coming into compliance with the Voting Rights Act. At the

same time, we are charged with drawing a plan that is constitutional under *Shaw v. Hunt* which requires us not to[*4] use race as the predominate factor. So, we are....we are caught between two difficult tasks. Amazingly, I think that we've been able to do that with this Plan A and with many of the negotiated proposals that have gone back and forth. If we reach a compromise, I would hope we could come into compliance with the compromise as well. But, I saw some hands. Senator Hoyle.

Senator Hoyle: Just curious how Mr. Stein came up....where he got the facts that Jones got 100% and Eva got 95%.

Senator Cooper: Adam, if you want to come up.

Adam Stein: This is evidence which was introduced in the Shaw against Hunt case by a social scientist who did....they are estimates and he looks at it two ways. And the way I was reporting was with his regression analysis. I think Senator Winner understands it better than I do. He looks at it two ways. One is looking at what he calls homogeneous precincts. These are precincts which are at least 95% minority. He looks at precincts that are at least....that are 10% or less minority and he sees how the vote breaks down that way. He also then does an estimate based on the percentage of....of voter registration by race and the....what the election returns show for that. And exactly what the mathematics are in coming to that estimate, I don't know. Clearly, when I said 100%, that is an estimate. It is obviously less than 100%, but it is overwhelmingly.... Congressman Jones got overwhelmingly high white vote. And

the homogeneous analysis, and he does both, as I recall it showed it about 95%. So it is a very high percentage of the white vote and I'm....

Senator Cooper: Yes

Senator Hoyle: You mentioned again Helms' race and the polarization there among the voters. What percentage black/white did Gantt get and Helms?

[*5]Adam Stein: Again, I'm using his....now using his regression analysis, it's the.... homogeneous analysis is....only a few points difference. The spread is about the same. In 1990, it showed that Gantt received 37% of the....and he expressed in non-black, non-African-American vote, and about 98% of the African-American vote. And that Helms had the reverse of 63% of the non-black vote and about 2% of the black vote. And then six years later when they ran again, that Gantt again ....this time had 36% of the non-black vote and 100% of the black vote. Again, this is an estimate....obviously wasn't perfectly 100%. And Helms had 64% and 0%....a small amount.

Senator Cooper: Senator Winner and then Senator Martin.

Senator Winner: As long as he's reading the numbers....could I ask you to read the numbers for just these northeast counties that are in the proposed 1st District.

Adam Stein: In the northeast counties, in .... for Helms, Gantt in 1996 and I don't have....have this for 1990. It showed that Gantt had 25% of the non-black vote. Statewide he had 36%. The 25% in the fourteen counties and 100% of the black vote and Helms had the reverse - 75% and 0% which shows that there is strong racially polarized voting across the state but it is much stronger in that portion of the state than in the rest of the state. It also showed the....the Engstrom report that the voter.... the participation rate, which is essentially turnout, that the non-black turnout percent was about 60% and the black was about 47%. And those numbers were about the same both in those fourteen counties and across the state.

Senator Cooper: Senator Martin

Senator R. L. Martin: Mr. Chairman, who is the gentleman speaking and is he an authority on redistricting or does he represent a group, or does he represent himself or what?

[*6]Senator Cooper: Please identify yourself.

Adam Stein: My name is Adam Stein, I'm a lawyer. I represent, together with other members of my firm, individuals who intervened in the Hunt against....in Shaw against Hunt case supporting the districting plan that had been in place.

Senator Cooper: Senator Martin.

Senator R. L. Martin: Is he speaking for this plan or against it?

Adam Stein: I am speaking in.....for the plan in saying that as you go through the negotiations that it's our legal position that it is required that there be a majority/minority district in the northeast part of the state.

Senator Cooper: And I would say....thank you Mr. Stein. And I would say that I think that, as I said earlier, we've met both tests with Plan A and that we have a majority/minority district in the 1st but at the same time it is geographically compact and it has a community of interest with rural agrarian northeastern North Carolina, in search of adequate economic development, etc. So I think we have been able to meet both tests.

Now, Senator Cochrane.

Senator Cochrane: At the appropriate time, I would like an alternative....

Senator Cooper: Okay.

Senator Cochrane: .....to offer an alternative to your map....

[*7]Senator Cooper: At this point, I'm going to recognize....I did not go over the specifics of Plan A because we did that at the last meeting and I think you all have maps and everybody is familiar with what it does. So at this time, I will recognize Senator Cochrane who will officially send forth an amendment which is essentially another plan. So ...

Senator Cochrane: There are lots of plans. The Sgt. at Arms will pass those out.

Senator Cooper: All right, Senator Cochrane is recognized to explain her proposed amendment. Senator Cochrane.

Senator Cochrane: Thank you Mr. Chairman and ladies and gentlemen of the Committee. There are some colored maps if you are interested and it is the map to the extreme right that is on the wall here. I beg your pardon, on the far left, unfortunately it is on the far left which is strange for me!

As I was listening to our esteemed Chairman, I was thinking how very similar the generalities could be of the maps that we are offering here today because the criteria that we used had three main points. Primarily we were trying to keep counties whole....

Senator Cooper: Members of the Committee, Senator Cochrane has the floor.

Senator Cochrane: We were trying to have districts that were compact and we were trying to join areas or counties of common interest. And we think from our map that we have accomplished that. Incumbency was not a criteria that we used. I believe the constituents choose the congressman, not that the congressman chooses the constituency. So we did not consider incumbency when we were drawing this map.

By striving to keep the counties in tact, there is the appearance of less gerrymandering and we think that was accomplished in this map. There are only 18 counties that are[*8] divided between two congressional districts and when they are divided, it is only two congressmen who represent the counties. That's for getting the numbers more the same in each of the congressional districts as I'm sure any of the maps end up doing.

We think the appearance of the districts is compact. There are no unusual shapes like the "Zorro" district down in Louisiana that we are all familiar with. We believe that we do show compactness and commonalties in here because of using the criteria that we did. This map, we think, will meet the constitutional requirements because we do not have that 1-85 corridor, the 12th district, that seemed to have given the courts a problem. Obviously, we could give you more detail. Quite frankly I recognize that in one respect I am sort of tilting at windmills here today. But I did think it was important that we offer you an alternative as members of this body and we are a significant number in the body. And we did have a criteria that we used that has directed the implementation of this map. We think it is an attractive map because of its compactness and we do think there are common areas....Senator Winner and I had a discussion of one problem....perhaps, depending on your view of commonalties, but except for that one, I think most of the areas....the counties do have a lot that they do together. In fact, some of the counties where there is a division in order to create the numbers as Bill Gilkeson worked with us, some choices were made in an effort to keep a part of the county where we

would have to split to get numbers, joined with the counties that they already did a lot of things together. For instance, industries or regional activities or common communities that shared schools, fire districts, that kind of thing. I hope you will consider this seriously and look at this. If there are questions, I will certainly try to answer. I will tell you, I am not an expert on map drawing, even after doing this one. It was simply a case of thinking it was appropriate that we have a map to present and so one was drawn, criteria was established that guided and you have the results of that before you today.

Senator Cooper: Thank you Senator Cochrane. As sponsor of the bill that you are attempting to amend with this new plan, let me point out....let me make a statement on[*9] it if I might, Senator Cochrane. I would ask you to oppose this amendment for a couple of reasons. The main one is the constitutionality of the plan. I have a problem, and I would think that our attorneys would have much more of a problem arguing the constitutionality of both the 1st and the 12th districts under this plan. And let me tell you why. First, the 12th District. It, although it does not have the majority/minority African-American, when you add it with Native-Americans from Mecklenburg to Robeson, then you do have just slightly majority/minority. I believe it's a little over 41% African-American and a little over 8% Native-American, so you add those together, you make it majority/minority. That in turn would trigger the test under *Shaw v. Hunt* and I don't think our 12th District...under Plan A has triggered the test. And when you look at the test under *Shaw v. Hunt*, the communities of interest between downtown Charlotte and Robeson County

are worlds apart. I want to point out a case to you. I think that this....this district is similar to Georgia's 11th District which was ruled unconstitutional in the case of *Miller v. Johnson*. And let me describe....the Supreme Court described that district this way. Connecting the black neighborhoods of metropolitan Atlanta and the poor black populous of coastal Chatham County, that's in Georgia. Though 260 miles apart in distance and worlds apart in culture, in short the social, political and economic makeup of the 11th District tells the tale of disparity, not community. I think that is right on point with what you have with the 12th District in Senator Cochrane's plan. In the 12th District in Plan A, you have...if you do trigger the test, which I don't think you do, but if you do trigger the test, you certainly have community of interest with the I-85 corridor and Mecklenburg to the Triad there. Secondly, the Court has talked about incumbency protection as being a....fair game in congressional redistricting. That was done in Plan A. Both Representative McMahan and I stated from the beginning that an even partisan balance, 6 and 6, would be the way to approach this process and it does not do that in Senator Cochrane's plan. Also, I think when you trigger the test, this shape will cause a problem. In the 1st District, I think you have some of the same problems. You do trigger the test because it is majority/minority and when you come into Durham County you then add the urban element to the rural element that we have in Plan A. We're solely a rural 1st district, but when you add the urban element, I think you lose**[*10]** your community of interest and I think you have a danger of unconstitutionality for both the 1st and the 12th districts. Now, can we have further discussion on the amendment. Senator Cochrane.

Senator Cochrane: Thank you, I appreciate that. I will immediately confess not being an attorney. I cannot respond to you perhaps as appropriately as I personally at this moment might like to. But I will tell you that I do question some of the comments you had to make. Some of the areas of commonality are, except for the part of Charlotte, I think that does apply. If you are talking about the 12th District, you are looking at 50.6%, that is true. If you include everybody, it is not anything I have heard about when we have talked in the past about minority representation that you brought in Asians, that you brought in Native-Americans and put that all together. So this is the first time I've heard our compilation of all of those in order to defend or, in this case, attack a minority district. I do think that the voting in the area and the contention that has been made in the past would indicate that this is not a problem. If you are again going to have representation of the people, that will also work out as it probably should. I cannot challenge, nor do I choose to, on the partisan area, keeping 6 and 6. It is not our role to try to protect the incumbents. We did not choose to do that. It is our role to put the people together in districts where they may choose the congressman that they wish to be representative of them. So I do not have an answer about your maintaining the partisanism, and this map will not stand that test.

Senator Cooper: Okay. Discussion. Senator Hoyle.

Senator Hoyle: What is the partisan balance in Senator Cochrane's plan? You just said you didn't know.

Senator Cochrane: He was saying that his was 6 and 6 and that this one would not do that. I told him I could not challenge it...

[*11]Senator Hoyle: What do you think this one is?

Senator Cochrane: I know the ones in the west are, I'm not sure about the toss up.

Senator Cooper: 8 and 4

Senator Cochrane: That's....he's saying because he contends that this one is and I do not.

Senator Hoyle: He'd better know.

Senator Cochrane: Well fine, but he didn't see the maps.

Senator Cooper: Senator Ballance.

Senator Ballance: Question for Senator Cochrane.

Senator Cochrane: Certainly

Senator Ballance: Senator Cochrane, your plan has 79,805 citizens in Durham County and you do not have in your plan Perquimans, Pasquatank, Chowan and Washington counties with a total of 69,248. I did that very quickly, I hope my math is right. But, based on what Senator Cooper just said, are you

not concerned that you are in fact bringing in an urban county and get the same numbers on rural counties?

Senator Cochrane: I'm sure that's possible. I'm not sure that I fully understand all that you are saying. Looking at the map, we have a lot of focus on compactness and areas being together that in some historical, traditional ways had frequently had been together. And so the comment you are bringing up about the urban and rural**[*12]** opposition is not something I am familiar enough within that section of the state to comment on.

Senator Cooper: Senator Ballance.

Senator Ballance: At present, you notice that the current map, the 1st District goes to Elizabeth City which is Pasquatank County, it also has Warren and Catawba and it has Washington in it. Currently those counties would be extremely compact up on the northern end of your district that you have drawn. I do have concern that the plan might not be constitutional. Obviously, I'd like to have a 1st District that....that's a high concentration of minorities to the extent that it could be done constitutionally. But, if you....to go to Durham and pick up 79,000 people, I don't know if that would solve the problem.

Senator Cochrane: One thing, if you will notice, we tried to give some consideration to....in the configuration of some of the districts had to do with the thought of the person in mind who would be representing that....If you look at their travel area, if you look at north, south or east or west, there're some elements like that that come into play that, quite frankly, play

out as well on this map as they do in Congressional A Plan that is there. Those are some facts that should be considered. Again, I can't answer you about the rural against urban in the areas you're talking about. I'm just not that familiar with them.

Senator Cooper: Senator Martin.

Senator William Martin: Mr. Chairman, I would just comment that I think.....in terms of commonality. I would go further to say that if we could draw a plan where race would be a predominant factor, then, yes, there would be a lot of commonality in the 12th District than was drawn. However, since we cannot do that under the Supreme Court ruling, since race cannot be a predominant factor, if we look at the other items,[*13] such as the state of the economy, the type of industry, factors involved in that industry, the predominance and availability of education institutions not in the other. You look at the social and cultural factors, etc. There is clearly not a commonality there and therefore, I believe it clearly would be held unconstitutional and would not.....the Supreme Court.....

Senator Cochrane: Well, tell me how you would defend your 12th District as it is now. How do you defend the parts in Davidson County for instance, being with Greensboro and Durham? You know, these maps are just like anybody else's maps. They're drawn the best anybody can for reasons that they are drawing. That 12th District on Congressional A map is drawn for very specific reasons, many of which you just talked about and the 12th District would challenge the comments you just made.

Senator William Martin: Okay, I would suggest that the.... when you look at the 12th District as drawn under Congressional Map A you do have that strong commonality interest in terms of the economic factors involved. There are always going to be some areas where that would not be the case. But the vast majority of the district itself is focused around particular types of business and industry, focus around the very strong focus on the educational sector and the commonality of other urban concerns that link from Charlotte to Winston-Salem to Greensboro, picks up Surry, picks up..... between....in that revised....the vast majority of the population is in that district. So I don't think we have....subject to challenge.

Senator Cochrane: And I understand what you are saying, but I think it is just as....It is not going to meet it as well when you are talking about those areas in between. They've become just as significantly a concern for someone like me or like the Judges, maybe, as you are saying in the other instance would be.

Senator Cooper: Senator Winner.

[*14]Senator Winner: I feel a need to talk about this 12th District in Senator Cochrane's plan which many people in the Mecklenburg part I represent, I also live in the current 12th District, I guess I'd live in it in the A Plan as well. The.... Senator Cochrane's plan, I think, has a really very difficult urban/rural split in her 12th District. Half of its people, 277,000, live in either Cumberland County or Mecklenburg

County. Now even between Cumberland County and Mecklenburg County, there is a very different kind of representation that's called for. The one being primarily military, the other having banking and very different kinds of interests. In between a very long and, I'll say, a very unpleasant three hour drive in-between, you have Union, Anson, Richmond, Hoke and Robeson counties, which have a whole other third world problems and economy and difficulties and kinds of representation that they need. So, I think that this district would be very difficult, if not impossible, for a single person to represent all the different interests well. The kinds of problems span the range from different economies to the problem of urban health care being very different from the problem of rural health care....the problems of urban housing be very different from the rural housing problems. The very things the federal government does are very different in these areas. The drive, seriously, from Charlotte to Fayetteville is miserable. It would be very difficult to campaign, it would be very difficult to hold district-wide meetings, and again, I think it would be very difficult to represent that district. And finally, I do agree with Senator Cooper that this plan disrupts the partisan parity in a very particular way. This plan completely changes the 8th Congressional District in a way I believe it would make it practically impossible for Congressman Hefner to be re-elected. And while Senator Cochrane was not out protecting incumbents, I can't help but note that Congressman Hefner is our most senior congressman. It is very valuable to the State of North Carolina to have him there. He is the ranking member of the Appropriations Subcommittee on Military Construction, which is very important to our state,

although not to Charlotte, but to parts of the state that he represents. And, while I don't think we should assure his re-election, and I don't think Senator Cooper's plan does assure his re-election, I think it would be a big mistake to make it practically impossible to get re-elected. So, for those reasons I could not support the plan.

[*15]Senator Cooper: Senator Kincaid.

Senator Kincaid: Thank you Mr. Chairman. Members of the Committee, I differ just a little with Senator Winner and.... I'm not sure that Senator Cochrane's proposal before us now would give us 8 to 4, maybe if you had a year like we did two years ago, but a year like we had this past election, I don't think that would be true. Now, Senator Winner, I hate to admit this, but it's going to be hard to match anyone from Mecklenburg in commonality. I'm sure Senator Rand will go along with that.

Senator Rand: I would.

Senator Kincaid: No offense intended, but we don't have any other counties that has the kind of prospective that Mecklenburg has. But, Senator Cochrane mentioned a minute ago and under Plan A, if you look up under the 12th, there's nothing that.... has in common with Mecklenburg, no more than does Robeson. But folks, I'll tell you, I don't know about your counties, but I can recall the last eight or nine years since we've had split counties, and my people in Caldwell County are so split, they don't know who their congressman is. And, consequently means more....and they have no allegiance to their

congressman. You should have an allegiance to your congressman. Senator Cochrane's proposal does the least splitting of any proposal yet. It only splits eighteen counties. I really believe we need to be concerned about the constituent and what's good for the constituent. And, now if I may go a little bit selfish, as a state senator, it's awful difficult for me to represent a county that's split because I have to funnel part of the problems to Congressman Burr, I have to send part of them to Congressman Ballenger and both of those guys are sending all their state problems to me and they are working me to death. So really, whatever plan we adopt, if we try to reach as close to minority that we can as Senator Cochrane has, if we try to be compact and her plan is more compact than any I've seen, and then if we try to solve..... problems, I think it is a good plan.

[*16]Senator Cooper: Senator Rand.

Senator Rand: Thank you Mr. Chairman. I agree with what Senator Winner says. We might be willing to trade NCNB, First Union for Fort Bragg, but I don't believe this will make it work. It is most important to Cumberland County that if we can continue our association with Congressman Hefner that we do so. We are split three ways now, this would split us two ways, between the 7th and the 8th . Congressman Hefner's ranking minority member, as has been said, on the Military..... the Appropriations Committee for Military Construction, which has been extremely important to our community. All of you know, of course, that the base closings have gone on around the world. For southeastern North Carolina, the part where I live, Cumberland, Robeson, Hoke, for that whole area Fort Bragg is

the thing that keeps us economically viable. When you look at the areas outside, when you go to Richmond County, which is not far from us, unemployment is significant. It is not significant in our county because of the military presence and because the buildup at Fort Bragg has gone on while the military worldwide has been shrinking. So we are most concerned about that and the implications for our area. Anybody who doesn't think that the military is important to our area should have been in Fayetteville when Desert Storm.... when the 82nd Airborne went to the desert. The Maytag repairman was lonely down there and it was really tough on business and it was a time that showed our area really what the military presence means to us. And we have been far more fair and far more nicer to our friends in the military since that time. I think the kind of district Plan A has, while not exactly as I would have it, it does show a certain commonality of interesting our area and it allows the 7th and 8th to co-exist together. Congressman McIntyre is on what used to be the Armed Services Committee, I'm not sure what they call it now, but we have a strong military presence in our area and we are now ably represented by two gentlemen who really have the military interest at heart and we are anxious to continue that representation. If your.....I do congratulate you on being a better person than I am**[*17]** and drawing this a 6-6, you know, I think you are to be congratulated for rising above yourself.

Senator Cooper: I have had a couple of out-of-body experiences.

Senator Rand: I figured you had, but obviously, Plan A suits southeastern North Carolina a lot better than that (*pointing to Senator Cochrane's plan*) plan.

Senator Cooper: Senator Gulley.

Senator Gulley: Thanks. Mr. Chair, I wanted to add briefly that one of the things I have learned through this process is that we have to abide by federal law to use 1990 census data as we make these plans and, therefore, when we're looking for a sense of how they will impact us with this number of races, several races that were looked at, whatever plan somebody draws, that they give you those indicators and I hear Senator Cochrane talking about how she hadn't paid any attention to incumbents, and how it affects one party one way or the other. But, then I look at her own data that she handed out.....I look at those races and I see where every Republican incumbent congressman is well protected. And in addition to that, eight of the twelve districts are made Republican districts and that is a significant change from where we are today. And it just lacks creditability to me that we are not paying any attention to the partisan impact of this. I do think we need to all have out-of-body experiences and transcend the effort to be partisan on this and that's the argument I think for Congressional Plan A.

Senator Cooper: All right. Senator Martin and then Senator Soles. I'm going to let Senator Cochrane wrap it up and then we're going to vote on this amendment.

Senator William Martin: Real quickly, I just want to say.... make a couple of comments on the issue of split districts. It was raised today, it was raised at the last[*18] meeting and at the public hearing. I just want to say just for the record....in my area there has not been as much dissension about split districts as one might think. As a matter of fact, in many instances, it can work well because we're represented by Mel Watt and Howard Coble. One of the things that's favorable in that situation is that when they get a call or inquiry, they don't ask where do you live, what street you live in, they.....both of them do that. And the same thing is true with reference to the three of us who represent Guilford County in the Senate. Senator Shaw, Senator Blust and myself, same thing. You..... in the area, any of us will deal with and I think most people see that not as a disadvantage but, if anything, somewhat an advantage in some instances. So I don't think that should be one of the issues that's.....

Senator Cooper: Senator Soles.

Senator Soles: I'd forgotten that the amendment was really what we were talking about and I want to make a motion regarding the bill.

Senator Cooper: All right, I'm....let Senator Cochrane wrap up. I told her I'd let her wrap up and respond on the amendment and then we will vote on the amendment.

Senator Cochrane: Thank you Mr. Chairman. Just one comment that I must make. I can appreciate you all picking

this apart, and that's perfectly all right. In the first place, I am not a map maker. But secondly, how those of you who're involved in drawing the original 1-85, many of you sifting around this table, and now have the second 1-85, can have as much to say as you can about some of the other districts is just a little bit beyond my ability to fathom. But that is neither here nor there. I appreciate that you allowed me the opportunity to come forward and present something. The other thing I would share with you, we were of the assumption in conversations with Bill Gilkeson, before getting these final numbers, there were six that we thought were districts for Republican, possibly seven and so I am sorry, I don't know where the eighth one is. I would be glad to look at it.

Senator Cooper: Senator Conder and then we're going to vote.

[*19]Senator Conder: I just want to rebut what Senator Cochrane just said about the 1-85. If you remember, Senator Cochrane, in the plan we set up there in 1991, only had one minority district and you folks wanted two, so you got two and that's where..... I just want to remind you of that...

Senator Cochrane: Where are the two? I mean you are just saying....

Senator Cooper: All right, all right. Senator Cochrane moves adoption of the amendment. All in favor of the motion, let it be known by saying "aye". All opposed "no". "No's" appear to have it. Did you call division? Okay. Division having been called, all in favor of the motion let it be known by raising you

hand. All opposed, raise your hand. Fails 4-11. All right, now. Plan A is on the floor. Senator Ballance.

Senator Ballance: I just wanted to make a couple of comments on....on Plan A. And I know we've all had enough of this and I think Justice O'Connor and Justice Thomas are wrong. That's got nothing to do with it, I suppose. So we've got to follow that ruling and Senator Cochrane, what I'm concerned about is the plan, Plan A as we have it here, I believe that, according to my research, you could....could split additional counties and come up with a plan that would have a higher percentage of African-Americans in it. But as Senator Martin pointed out, you cannot use race as the predominant factor. And so, while I'm not totally carried away with the 1st District, I think under the law, it's probably as close as you can get - you only split in that district, I think, six counties....five or six counties and maybe twenty-four in the plan as Senator Cooper pointed out versus forty-six. But, here's what concerns me and maybe this has got nothing to do with anything. But until '92, it's been almost a hundred years since George White was in Congress after the last African-American was elected. His home is still there in New Bern, preserved and we could have a situation, I hope and pray we**[*20]** don't, where because of this ruling, which I said I don't like, we might have no African-Americans representing this state. That's sort of a scary feeling and I know those of us sitting around this table wouldn't want that to happen. And I don't know why it is that the Supreme Court said that the plan was ugly, we couldn't use it because I've seen some plans dating back to the turn of the century where the lines went all kinds of ways. And so we're trying to comply

and the plan that has been drawn here, presented as Plan A, tries to comply with the law and a lot of us are going to go silently because we think it fits within the law. That's the only reason as far as I'm concerned.

Senator Cooper: Senator Winner.

Senator Winner: In contrast to the 12th District in the Cochrane Plan, I do think that the 12th District can, in Senator Cooper's plan, make a lot of sense. In fact, there is an urban/Piedmont presence that gets very well represented in this plan. It gets to have a voice. Of the 550,000 people in that 12th District, over 70% of them live in Mecklenburg, Forsyth and Guilford counties. And they do have a real commonality of urban interests with inner city schools, urban health care,..... problems, public housing problems and it is a part of the state that deserves to be represented and is well represented in this plan. It is also a very functional district. You can drive from one end to the other of it in an hour and a half without speeding. It would be easy to have district-wide meetings, to campaign, to get.....for any constituent to get to....if you have a congressional office in Greensboro and one in Charlotte, any constituent could get to one of those offices within an hour, it would be very functional, it would be in two media markets, not spread all over the place. It would be easy to have communication. I will say from Mecklenburg County, it has been very good for us to have bi-partisan representation. There have been many instances in which Congresswoman Myrick and Congressman Watt working together with the Republicans in Congress and the Democrats in the administration. They

have been able to do a very good job of representing us but yet it is good to continue to do that. And I would think that that will be as true as well for Forsyth and Guilford as they will be well-served by having two congress people, **[*21]** probably of different parties. In addition, this plan only divides one precinct in the 12th Congressional District and that one little piece is taken off in Mecklenburg County only has one house in it and it is divided every.....in the county commission plan, in the city council plan, in the school board plan, it's just an odd shaped precinct. So that little house is used to being separate. And, it's a house that is in an industrial....part that is otherwise industrial. It....it divides no counties into three districts. The former 12th District divided almost all of these counties into three districts and it only has six counties in it. It can really function as a district. And I would say, since I'm very happy having Mel Watt as my congressman, I also view it as a plus given the voting behavior of the people of our congressional district that our current congressmen have a fair chance of getting re-elected. And I think that.....

Senator Cooper: Senator Hoyle.

Senator Hoyle: Mr. Chairman, I've been redistricted to death. I'd like to move for favorable report.

Senator Cooper: Senator Hoyle has moved for a favorable report for Senate Bill 433. Further discussion. Hearing none, all in favor of the motion let it be known by saying "aye". All opposed "no". The "ayes" appear to have it, the "ayes" do have

it. The bill is given a favorable report. Thank you members of the Committee.

The meeting was adjourned at 5:10 p.m.

/s/Roy A Cooper, III
Senator Roy A. Cooper, III, Chairman

/s/Susan M. Moore
Susan M. Moore, Committee Clerk

ATTACHMENT # 3
March 11, 1997

Senator Roy Cooper
Chair, Senate Congressional Redistricting Committee
North Carolina General Assembly
16 West Jones Street
Raleigh, North Carolina

RE: Congressional Redistricting

Dear Senator Cooper:

As you may recall, this firm represents defendant-intervenors in the *Shaw v. Hunt* litigation. Included in the materials we submitted at the Joint Congressional Redistricing public hearing on February 26, 1997, was analysis of racially polarized voting by Professor Richard Engstrom. Professor Engstrom's report was based on various elections he analyzed prior to the trial in the *Shaw v. Hunt* case in 1994. We asked Professor Engstrom to update his study by looking at the most recent Gantt versus Helms election. In particular, we asked him to look at the level of racially polarized voting statewide as well as the level of racially polarized voting in the northeastern region of the state, which we defined as the eighteen counties that are included in the proposed First Congressional District in the Senate plan, 1997 Congressional Plan A.

There are two important findings in Professor Engstrom's updated analysis. First, he found that there is greater polarized voting in the northeast than in the state generally. Second, he found that turnout for African-American voters is significantly lower than turnout among non-African-American voters. Both of these findings support the propositions that there is a strong basis in fact for concluding that the legislature's failure to create a majority black district in the northeastern region of the state would violate Section 2 of the Voting Rights Act.

I am enclosing for your consideration a copy of Professor Engstrom's report of his findings. Please feel free to give me call if you have any questions. Thank you very much for your work on this very important issue.

Sincerely yours,

/s/Anita S. Hodgkiss

ASH:rer
cc: Members, Senate Redistricting Committee

ATTACHMENT # 4
February 7, 1997

Ms. Anita S. Hodgkiss
Ferguson, Stein, Wallace, Adkins, Gresham, and Sumter
Suite 300
741 Kenilworth Ave.
Charlotte, NC 28204

Dear Ms. Hodgkiss:

I have performed, at your request, an analysis of the vote for Mr. Harvey B. Gantt in the November 1996 general election for a United States Senate seat in North Carolina. This work supplements the analysis of North Carolina elections that I performed previously for the State of North Carolina in the *Shaw v. Hunt* litigation. The methodologies employed in the analysis of this election, regression and homogeneous precinct analyses, are identical to those employed in my previous reports for the state. The voter registration data utilized to analyze this election are for October 11, 1996, and therefore reflect the registered electorate at the time of this election.

The homogeneous precinct analysis concerns the votes case in the precincts in which over 90% of the registered voters was African American and in which less than 10% was African American. Mr. Gantt received 97.9% of the votes cast in the homogeneous African American precincts across the state, but only 38.1% in the homogeneous non-African American precincts. The voter participation rate in this election in the homogeneous African American precincts, expressed as a

percent of the registered voters, was 49.6%, while the participation rate within the non-African American precincts was 59.0%

The estimated support for Mr. Gantt among the African American voters in this election produced by the regression analysis, which is based on the votes cast in all of the precincts in the state, is 100%. His support among the non-African American voters is estimated by regression to have been 35.7%. The correlation coefficient for the relationship between the racial composition of the precincts and the vote for Gantt is statistically significant .777. The regression estimate of the participation rate in this election among state's African American registered voters is 46.8%, while that for non-African Americans is 58.9%.

You also requested the results of these analyses for the northeast region of the state, an area that you informed me is comprised of the following 18 counties; Beaufort, Bertie, Craven, Edgecomb, Gates, Granville, Greene, Halifax, Hertford, Lenoir, Martin, Northhampton, Pitt, Vance, Warren, Washington, Wayne, and Wilson. The vote in this area is more racially divided than in the state as a whole. Mr. Gantt received 96.6% of the votes cast in homogeneous African American precincts in this region, but only 29.0% of those cast in the homogeneous non-African American precincts. Voter participation in these African American precincts, again expressed as a percentage of registered voters, was 50.2%, compared to 61.9% in the non-African American precincts.

The regression analysis of the votes cast in all of the precincts in these 18 counties places Mr. Gantt's support among the African American voters at 100% and his support

among the non-African American voters at 24.9%. The correlation coefficient for the relationship between the racial composition of the precincts and the vote for Gantt is .930, higher than that for the state as a whole. This is also a statistically significant correlation. The regression estimates of the voter participation rates in the northeast region are 47.0% for African Americans and 61.6% for non-African Americans.

I hope you find this information useful. If you require any additional analysis, please let me know.

Sincerely,

/s/Richard L. Engstrom
Research Professor of
Political Science

[This page intentionally left blank.]

SECTION 97C-28F-4E(1) (EXCERPTS)

MINUTES

HOUSE COMMITTEE ON
CONGRESSIONAL REDISTRICTING
FEBRUARY 12, 1997
3:00 P.M.

W. Edwin McMahan, Chairman

[*18] **Chairman McMahan:** If you don't mind, prerogative of the chair, let me make a couple of closing comments. First off, I would like to say that we know this is probably one of, if not the, most partisan issues that we will talk about this session. It always is, and there is no reason for it to be any different this time. I really do hope that all of us working on this Committee and working with the Senate can recognize that we do have [*19] an April 1st deadline, and that we do try to put forth our best effort to approach this in a non-partisan way to really come up with a plan that has the best change to be approved by the court, and at the same time be acceptable by both sides. I've heard a lot of Members say that they really believe that there is an advantage for the Democrats if, in fact, we don't reach an agreement and it goes to the court and the three judge Panel decides. That's been said, but I don't really believe that the Senate leadership, and I certainly don't believe the incumbents that are holding these offices in these twelve districts are in favor of us not trying to do our job, and do it to the best of our ability and try to reach an agreement. I don't think any of us

want to let the court decide this issue. We really want it to be the very last resort. I want you to know that I have been assured by the leadership of the Committee on the other side that they do have an attitude that they want to cooperate and all of us try to get on board and agree upon a plan that both sides can live with, and again, hopefully, it's not going to be their plan and our plan and they are far apart, which again if they are done in a completely partisan way, they are going to be far apart. I hope we can approach it in a way that we know we don't have a lot of time and try to do our job, but do it well. I'd like to just make three or four points about the plan itself.

First off, it's a plan that will only be for four years -- so it's not like it's a plan that's going to be for the next ten years -- it's only a plan for four years. I want to also point out to you that everyone needs to keep in mind that currently we have a balance in the State Congressional seats, six Republicans and six Democrats, so I think it's extremely important that we focus on the idea that we want to continue to maintain balance. It's very important as far as the new plan is concerned. We also have to keep in mind that I think the plan that has the best chance to be approved will be the plan that protects the current incumbents. So, it is more of an incumbency plan, and some of you may not like to hear this, but I think the plan that protects the existing incumbents and does the least in the way of changing the overall plan has the best chance of being approved and everybody getting on board -- again, in this short time frame. We know that we have got to redraw the 12th District. There's no question. We certainly believe [*20]also have to redraw the 1st District, even though it has not been ruled unconstitutional -- everyone tells us, and we

certainly have been given the opinion that it probably needs to be looked at. They didn't actually say it was unconstitutional, but they sort of just said the first one is and leave it at that. If you look at this map up here, it's pretty obvious that number 12 is unconstitutional, but if you look at number 1, to me it is probably just as bad. I do hope that we can keep in mind that we want to draw a plan that certainly, of course, will consider race, and it will certainly be a consideration, but we will not base it on race. At the same time, we have got to keep in mind that we have got to be geographically compact. That is certainly a condition that we have been told -- in my opinion from what I've read about it -- as well as race -- so both things have to be considered. I think also, of course, we want to try to divide as few counties and precincts as we possibly can, and as to how much flexibility we have on population -- I know we're hearing all kinds of answers. I don't know what that is, but at the same time, Georgia has drawn a plan that now takes into consideration trying not to divide counties, and we ought to make that effort to try to divide as few counties and as few precincts as we possibly can, and then again as I mentioned earlier, I think we have got to think in terms of generating a plan that protects the incumbents as best we can and maintains the balance that now exists, and hopefully, with that in mind, and all of us on board to try to work together. Again I know I am a newcomer to this process, and I might be too optimistic that we're going to get everybody on board, but I don't really have a choice at this point in time and I don't think we do. The only way we're going to do this job and do it right is for everybody to get together and look at it as if we're balanced today -- let's do the job we need to do and walk away with a

plan that is still balanced. I have been assured by the other side that is the way it is being approached, and their plan next week will be a plan that we will not just turn our backs on. We'll have to wait and see, and I hope the Committee again will keep a optimistic attitude until we do that, and at the same time I have asked Staff to, of course, try to determine the criteria as best we can and asked Linwood to go ahead and pull some of these plans. We've got some plans. There have been a lot of them drawn over the past year, and there are some that we probably [*21] already know about that will come out of the other side and I'm pretty optimistic. I hope all of you will be, and all of us can keep that kind off attitude and get on board and get this job done. I wanted to close with that, but hopefully we'll continue on and answer any other questions.

SECTION 97C-28F-4E(2)

MINUTES

HOUSE COMMITTEE ON
CONGRESSIONAL REDISTRICTING
FEBRUARY 25,1997
1:00 P.M.

Chairman McMahan: Good afternoon. I'm Ed McMahan - I'd like to welcome all of you - Committee Members in particular and all the members of the Press and guests to our Congressional Redistricting Committee Meeting this afternoon. I am very pleased to present this afternoon the House version of the Congressional Redistricting Plan. Even though it's probably impossible to draw a plan that everyone finds completely acceptable, I sincerely believe that the plan we are presenting here this afternoon is very close to being a perfect plan -- a plan that recognizes racial fairness but does have geographic compactness to the districts, while maintaining the balance that exists in our Congressional Delegation.

The leadership of the House has said from the very first day of this session that we are very interested in doing this job, which we are actually responsible to do in a fair and non-partisan way.

We all recognize the problem we have with the Justice Department telling us to have minority/majority districts while the Supreme Court has ruled that the manner in which we drew these district lines used race as the predominate factor, and that was not an acceptable practice. Add the incumbency issue to

that, and what is needed to get a consensus on both sides, and you can see that we have a very tough assignment, but I have tried to stress from the beginning that we on the house side are interested in fairness and that means maintaining at least the current balance we have in our Congressional Delegation.

As I said last Thursday, the Senate Plan was an excellent start. You will see many similarities between the two plans -- in fact, many of the districts are either identical or so similar it may be scary to many of you that have been here a while. One of our major concessions has been to not try and force drawing district 12 from Charlotte along 74 to Robeson County. The Senate said early on that this was unacceptable, and we have certainly respected their wishes.

The highlights of our plan are as follows:

1. We split 19 counties - I think we can go to 18 counties - in lieu of the 24 on the Senate Plan and 45 on the current plan.

2. We make District 12 more compact than the Senate Plan. We fear that the Senate Plan may not be as compact as it needs to be for the Court, so we have taken a more direct route to Greensboro from Charlotte.

When you do make it more compact, we do reduce the minorities in this district, but I am 100% confident that a minority can certainly win in a district that exceeds 40%.

We cross Cabarrus County and Davidson in lieu of Iredell and Davidson, and we do not enter Forsyth County with the 12th District.

3. Districts 8, 9, 10, 11 are very close on both plans.

   A. Based on the 90 registration data, we have actually strengthened these slightly for the incumbents.

4. Next District 7 - the McIntyre District is actually a little stronger Democrats because of the minority added from Congresswoman Clayton's District before.

5. District 6 is almost identical between the two plans - we originally had Moore County in District 2, but we have moved it back to be similar to the Senate Plan. We have moved it to District 6.

6. District 5 is similar except we have to make it more compact by moving all of Forsyth and Yadkin into District 5 -- and not dividing Wilkes -- and moving Caswell into District 6.

7. District 2 and 4 which divide Wake County on the Senate Plan - our plan does also divide Wake County, but we felt we needed to

maintain more balance in these two Districts. We moved some Republican voters from District 4 (Cary and the Northwest quadrant of Raleigh) into District 2, but left the area inside the Beltway in District 4 -- along with Orange, Durham and Person County.

8. We feel that the Senate Plan treated District 3 - the Walter Jones District – very unfairly, and we moved the majority of Wayne County back into this District and did not split Beaufort County as the Senate Plan does.

We also gave District 3 a portion of New Hanover County but followed the Senate Plan and did not include Sampson County. As it is now, it will move to District 7 along with Duplin County.

9. Finally, District 1 is now drawn to be far more geographically compact than the Senate and is similar to the actual Senate Plan, except we do include Pasquotank, Camden and Tyrrell County in District 1, and we do not divide Washington County like the Senate Plan.

Our District 1 has a minority/majority of 50.26% versus the Senate Plan of 50.11%.

I also want you to know that I am going to recommend to Senator Cooper that we consider renumbering the Districts. There just has to be a better way to number the Districts than they currently are from the Coast going West. I'm not sure whether we can do that or not, but I think it's something we ought to consider.

So, to close, I hope all of you see a lot of positives in this plan. Please remember we are developing a plan for only the next four years. I sincerely believe that this plan does have geographic compactness, but it also recognizes the need for racial and political fairness that must be present in order for us to get the support of both chambers.

I certainly would welcome any questions or comments by Committee Members at this time.

Representative McAllister: Do you have the percentages in this plan for District 7.

Chairman McMahan: Yes Ma'am

Linwood Jones: Are you looking for the total population or registration.

Representative McAllister: What are these based on - population - total population or what.

Linwood Jones: We have reports on different categories - we have it on total population- we have it on voting age. It's in your package - the second part of that package.

Chairman McMahan: Representative McAllister, as far as number 7 - I would give you the data that I have. We're showing the current plan has about 70.6% Democrats -- if you're asking the difference between Democrats and

Republicans. The Senate version increases that to about 72%- the House Plan actually increases it to 75% -- so actually District 7 becomes stronger under our Plan than it does under the Senate version.

Representative Sutton: I have some concerns about Robeson County. Under the Senate Plan there was less division of Robeson County, and under the House Plan it's split almost equal, and to me that's critical because that's the center of the Native American population in Southeastern North Carolina -- and what they are doing in the House Plan is -- for total population you split about 6% in one district and 3% or so in the other. That is certainly diluting the 9 or 9 ½ % Indian vote down in that area. It just appears to me that this was done -- for whatever reason -- with no regard for the Native American population down in that part of the county.

Chairman McMahan: Thank you, so the Senate version is much more palatable.

Representative Sutton: The Senate version is much more palatable to the people in my district than the House version. We have some minor concerns with the Senate version but we have a lot of heartburn with the House version.

Chairman McMahan: Thank you Sir.

Representative Fitch: District 1, District 6 and District 12 - going to be 1,000 off the ideal population - you plan on working on that or do you plan on leaving it as is.

Chairman McMahan: Yes Sir, the final Plan will have to continue to look at the population. As of right now we are - as I mentioned - we're only dividing 19 counties - we're actually only dividing 2 precincts. As we try to get this closer -- you know the question is will we need to go down to one

vote - one person districts - but to answer your question Representative Fitch, we do need to still do some minor adjustments with the Senate to get this probably less than 1,000 - whether it needs to go to one - we'll have to decide that. I personally am more inclined to think that maybe we can use a 200-250 number if it turns out to be necessary to keep from dividing precincts - but of course that would be something the Committee will have to decide and we'll decide with the Senate.

Representative Morgan: Thank you Mr. Chairman. It appears likely that the House will not accept the Senate Plan, and these bills, or one of these bills will go to Conference - and isn't that the time we'll have to finalize agreements to get it as close as we can, so each District will have the proper number.

Chairman McMahan: Yes Sir, I do believe that what I hope we can do is to get feedback from the Committee Members today, and we'll, actually spend the next few days sitting down with the leadership of the Senate Committee and look at the differences between the Plans and see if we can come to a Plan that we can all agree upon that we'll bring back to you and they will go back to the Senate - of course at that time if we can find a common ground, and we feel we can introduce a Plan to both Committees, and maybe run one bill in both Chambers - that will be the time we will make the adjustments for the size of the Districts. If we see that we cannot reach an agreement, or run one bill - Representative Morgan, I think the way you described it would be the way it would work. We'll do it in the actual Conference Committee after we each do our own bill.

Representative Hill: Thank you Mr. Chairman, I agree with Representative Sutton - I hope we can do something about Robeson County because we're dividing the District all to pieces there. I like the 7th Congressional District, and I like keeping Hanover in District 3 - I don't think we need that in District 7 - if we can work out the numbers, I think he's got a good point.

Chairman McMahan: Thank you, we'll certainly look at that.

Representative Russell: Yes, I wanted to ask as we go into the process of deciding between the two Plans if we have concerns - for example - Wayne County is still split - Lenoir County is still split - do we put that request in writing to you or how do we communicate that.

Chairman McMahan: Certainly you need to communicate it to me, and I think depending on the number that have remarks - I think that would be an excellent idea -- so if you would -- all Committee Members -- any thoughts or comments after you have had a chance to look at it later today-- if you would jot those down and give those to me - then we'll take those and use those as we meet with the Senate.

Representative Sutton: Mr. Chairman, can you give us some feel for the time frame that you are going to be operating under for this - try to get an acceptable bill to both Houses prior to deciding that you are going to go with a particular bill - whatever it is - can you give me some time frame for that so we'll know how expeditiously we need to work and what have you.

Chairman McMahan: Representative Sutton, I spoke with Senator Cooper yesterday. He agreed not to introduce his

bill until he had a chance to review our Plan following the presentation today. I think we'll get together during the next couple or three days and we'll see if we're going be able to put the two together - if not, then I would envision next week -- we'll have a Public Hearing tomorrow and get the feedback from the Public - factor all that in -- if we're not able to get together again next week - then try to come up with a House version to be introduced as a House bill - with them doing their bill. I envision that being done in the next week.

Representative Justus: Hearing no positive remarks, Mr. Chairman, it must be a good Plan, because everybody must be dissatisfied.

Chairman McMahan: Thank you very much. Any other questions or comments. If not, this meeting is adjourned.

The meeting was adjourned at 1:25 P.M.

/s/W. Edwin McMahan
W. Edwin McMahan, Chairman

/s/Sharon Cram
Sharon Cram, Committee Clerk

[This page intentionally left blank.]

SECTION 97C-28F-4E(3) (EXCERPTS)

MINUTES

HOUSE COMMITTEE ON
CONGRESSIONAL REDISTRICTING
MARCH 19, 1997
3:15 PM

W. Edwin McMahan, Chairman

[*1] Chairman McMahan: Good afternoon. I'm Ed McMahan and I'd like to welcome the Committee Members here today. I'd like to welcome the guests who are here with us. Our Pages for today are Kristen Howell from Ash County and Cynthia Ferrell from Johnston County. Welcome, we are glad you are with us this week.

Before we get started and entertain questions about what is being passed out to you, I would like to open by making a few general comments to you. Some of us have been working very, very hard since our first Committee Meeting on February 12th to negotiate a Plan that would be acceptable to both bodies while still being racially fair, geographically compact, incumbency friendly, and divide as few counties as possible. **[*2]** During this period of time, of course, I have asked most of you to give me back any comments or feedback that you had, and we have tried to look at Plans and take your comments back and discuss them and try to incorporate them into the Plan -- again keeping in mind though that we needed to develop a Plan that could be approved by both bodies. I want to thank each and every one of you for the time you have

put into it and the feedback you've given us. We also, of course, held a Public Hearing to hear from the citizens of North Carolina -- other legislators who are not actually serving on this Committee -- and we've tried to respond to their comments as best we can. We appear to be very, very close to agreeing on a Plan that at least the Chairpersons of the two Committees believe would be acceptable to both sides, but quite honestly I must tell you that we are not quite there. I have decided today to have the Committee Meeting and to bring to you one version of our Plan, and the one that I hope you will approve and recommend to the other House Members. The leadership of the House has asked me to work for a Plan that both sides could agree on and that is exactly what we have tried to do, but with the April 1st deadline only seven legislative days away, both Senator Cooper and I believe that we need to proceed to approve a Plan in each Chamber and then let us continue to negotiate. Our goal was to come to an agreement before introducing a bill, but with the deadline pending, I think we need to move ahead.

The Plan being shown to you today is what we call Plan G, and it's the one that we actually presented back to the Senate -- or I did -- last Friday. We felt then, and we still do today, that this should be a Plan that's acceptable to both sides. We have decided not to go back to an earlier version of our Plan as the Senate may do today when they meet at 4:00 P.M., because I personally believe that that really means moving backwards, and I certainly hope that this is not the case. I must say that I was somewhat disappointed yesterday when the Senate responded to the Plan you'll see today and the response did seem to move somewhat backward. I want to still say that

we are very, very close and, in fact, the reason I was late coming over here was that Senator Cooper was talking to me, and we're continuing to talk, and again, I think we're very close to having a Plan that at least the Chairpersons agree upon. The Plan you see does maintain racial fairness in [*3] District 1 and 12. We've actually agreed to increase the percent of minorities in District 12 to 46% and are now basically following the Senate Plan on District 1 and 12. We recognize the division that occurred in Robeson County, as far as the Indian population was concerned in the earlier plan, and we've corrected that problem. Also, we've moved to compromise District 3 to move New Hanover County back to District 7, and moved several Northeastern North Carolina Counties into District 3 as the Senate requested. In District 2 and 4, our Plan is intended to be a reasonable compromise. The Plan strengthens the number in District 4 for the Democrats, but it maintains in District 2 the balance that occurs under the current Plan. The current Plan and the Plan you're looking at basically has approximately -- as best we can tell -- a 70/30 registration in favor of the Democrats over the Republicans and, as best we can tell, it maintains about a 53/47 margin that Congressman Etheridge had during the last November election. So again, as far as District 4 is concerned, it is definitely with Durham County being added to that district -- it's probably shifted towards the Democratic side. District 2 -- we've tried under this Plan, and Staff has been instructed to really sort of maintain what the current Plan shows. We believe that this approach is a fair approach and should be the basis for our agreement and, of course, I would again very much appreciate

the Committee Members support of this Plan and would ask for any comments or questions that you might have at this time.

Representative Blue: Mr. Chairman, I noticed that in reading the cover sheet that you are basing it on election data from the '90 and '88 elections. Is there any particular reason the election data wasn't updated to reflected current trends.

Chairman McMahan: Representative Blue, we have actually gone and gotten this current data as best we can. What I described was based on the fall of last year's election results. The printed data, of course, has been what's been part of the package from the very beginning, and what's been handed out doesn't reflect the current figures because they are basically estimates. Staff has gone back and tried to go -- because the Districts are not the same, and obviously they overlap, and they actually involve several Congressional Candidates -- not just the Candidates presently holding office in 2 and 4 -- **[*4]** so the figures that Senator Cooper and I are looking at actually are based on current registration as best we can determine '96 and also based on '96 election results. I don't know whether you'd like Staff to comment on that. If you feel it appropriate, I would be very happy to ask them to.

Representative Blue: No - my question I guess - and you've answered it - you're saying that these maps now are based on '96 election results and Congressional races as well as the election data from the '90 Senate election, '88 Lieutenant Governor's election, and the '88 Court of Appeals election.

Chairman McMahan: Sort of a combination, Speaker Blue, of all of it. We've analyzed it from every angle and both sides have tried to come up with what could be the best set of data we can get. It is being analyzed not only on the old data

– what it is on is current data – particularly as it relates to District 4 and District 2, Speaker Blue, because those are the two that we feel like are the ones we are having to have the most discussion on. The rest of the Districts are – both sides I believe feel like we've balanced and left basically as they are.

[This page intentionally left blank.]

SECTION 97C-28F-4E(4) (EXCERPTS)

MINUTES

HOUSE COMMITTEE ON
CONGRESSIONAL REDISTRICTING
MARCH 25, 1997
3:25 P.M.

W. Edwin McMahan, Chairman

[*2] [Chairman McMahan]: . . .I believe our Plan does a much better job than the Current Plan in providing geographic compactness, homogeneous compatibility, and divides less than half the Counties than the current Plan does. At the same time, it recognizes racial fairness and is friendly to our incumbents, which we both determined on the front end to be an important consideration in this process.

Now I hope that you the Members of the Committee will recognize this Plan as certainly not a perfect Plan, but a Plan that has been negotiated in good faith between both sides and will be found acceptable to you this afternoon. At this time I would like to call on Senator Cooper to say a few words.

Senator Cooper: Thank you Mr. Chairman. I appreciate the opportunity to appear before your Committee. We are currently on the Senate floor debating the Excellent Schools Act so I need to get back as quickly as possible, but I would like to say that we as a Legislature were given the responsibility by the Courts before April 1st deadline to redraw these Districts. I think this agreement is a large step towards fulfilling that responsibility. It would be very easy to turn this

matter over to the Courts and avoid that responsibility. I think it's also very easy to vote against the Plan because each one of us can find a problem with it. Those of you who dealt with Redistricting before realize that you cannot solve each problem that you encounter and everyone can find a problem with this Plan. However, I think that overall it provides for a fair, geographic, racial and partisan balance throughout the State of North Carolina. I think in order to come to an agreement all sides had to give a little bit, but I think we've reached an agreement that we can live with. I think it is much better than rolling the dice with the Federal Courts, and I hope that you will give it your due consideration. I also want to publicly thank Representative McMahan for working with me. It's a very contentious issue and we have **[*3]** dealt with each other on an up front and honest basis from [t]he beginning, and I appreciate the opportunity of working with you on this Representative McMahan.

* * *

[*3] Linwood Jones: The Plan we reported out last week was labeled Plan G. This is, of course, labeled '97 House Senate Plan. I'm doing this visually -- so I'm just going to give you some of the major differences, but in District 5, Ash and Yadkin have flipped between 5 and 10. In Iredell we have gone into Statesville, which I believe picked up the minority percentage of District 12 -- we came a little bit more out of Southern Rowan **[*4]** when we did that. District 7 and 8 down in the Cumberland, Robeson area is different -- we pick up a few more precincts along the western edge of Robeson County

-- Ft. Bragg goes into District 7, which is now represented by Congressman McIntyre. Sampson County is a little different in our Plan we passed last week -- we took a few more Northwestern Precincts from Sampson County into District 2 -- you can see we have retreated a little bit from that in this Plan. Wake County is different -- the major differences in Wake County are that a little more of Northwest Raleigh goes into District 4. Inside the Beltline, a little more of that comes into District 2 than what we had put in Plan G last week. Those are the major changes. There are a couple of small changes in Jones and Craven Counties, but for the most part District 3 and District 1 are essentially the same as last week.

[This page intentionally left blank.]

HOUSE CONGRESSIONAL
REDISTRICTING COMMITTEE
DISCUSSION HOUSE FLOOR 3-26-97

[*1] Speaker Brubaker: For what purpose does the Gentleman from Moore arise.

Representative Morgan: Mr. Speaker, House Bill 586 - short title - Congressional Redistricting 2 is placed on today's calendar.

Speaker Brubaker: Clerk will read.

Clerk: House Congressional Redistricting Committee - House Committee Substitute for House Bill 586 - A bill to be entitled **AN ACT TO DIVIDE NORTH CAROLINA INTO TWELVE CONGRESSIONAL DISTRICTS.**

Speaker Brubaker: The Chair recognizes the Gentleman from Mecklenburg to explain the bill.

Representative McMahan: Mr. Speaker - Members of the House – Eight weeks ago today I was appointed by Speaker Brubaker to chair the Congressional Redistricting Committee. At the time, I really didn't know what I was getting into, but today I must wonder what I did to the Speaker to deserve this punishment.

Seriously, I first want to thank the 25 Members of our Committee for their input and support. The Committee Substitute before you has received a favorable report from our Committee and does include the Plan agreed upon by the Senate Congressional Committee. So this Plan has been negotiated between both sides for the past eight weeks. It is not

a perfect Plan, but we have tried very hard to agree upon a Plan that is based on geographic compactness, racial fairness, population that is homogeneously compatible, incumbency friendly, and would divide the fewest number of counties and precincts as possible. The Current Plan divides 45 Counties and 80 precincts - new Plan divides 22 Counties and only 2 Precincts.

I want to point out to each member that this job has been made doubly hard because we received an ultimatum in 1992 to have a second Majority /Minority District, but last year our 12th District, as you know, was ruled unconstitutional. So the point I **[*2]** want to make is that we have tried to agree on a Plan that will be approved by the Justice Department and also be found constitutional.

As I said earlier, we don't have a perfect Plan, but I want you to compare it closely to our Current Plan that I have placed on your desk.

Starting in the West, please look at District 9, 10, 11 and see that we no longer divide Buncumbe, Henderson, Polk, McDowell, and Rutherford County.

The current Plan also has parts of District 5 extending into Burke, Caldwell and Wilkes County - our new Plan no longer splits those counties.

We also have now Cleveland and Gaston together in District 9 and not divided as in the Current Plan.

As you look at 12, we no longer extend from Gastonia to Durham - now only extends from Charlotte to Greensboro. We believe this District will now stand a Court test for the following reasons:

1. Not a Majority/ Minority District now so shape does not create that - that was the basis the Court used to say this was unconstitutional - not an argument now.

2. Population in 12 has homogeneous interest - comprised of many citizens living in an urban setting.

3. Drawn to protect the Democratic incumbent.

All three factors are recognized as legitimate factors for drawing Congressional District Plans.

Not a great deal of change has occurred in District 8 except now we don't divide Moore County.

District 6 is also very similar - except it includes Moore County.

[*3] Moving East, a great deal of change and certainly improvement has occurred due to realigning District 1 - old map has District 1 really scattered over the entire Eastern North Carolina. Now we have a considerably more compact District 1 that still has over 50% of a minority population.

With the changes in District 1, we are now able to keep Columbus, Brunswick, New Hanover, Pender, Duplin and Onslow Counties together, and all in District 7 except Onslow, which is in District 3.

District 3 also more compact because it does not now come from the coast all the way into Sampson and Duplin County.

Now to the Triangle where we have caused the most controversy. If you look at the Current Map, you see how District 2 wraps around Wake County on the north and takes

part of Durham County - now that District 12 from Charlotte no longer extends into Durham County, it certainly makes more sense to put Durham back together and combine it with Orange County and Chatham County -- counties already in District 4– than to either put it entirely in District 2 or extend District 1 down from N/E to pick up Durham County. When we pick up Durham County, it obviously causes us to divide Wake County, and the logical division in my opinion is to include the Research Triangle and Western Wake County in with Durham and Chapel Hill, and Eastern Wake County moves into District 2. This also makes more sense to me than the original Senate Plan that divides Wake on a more East/West line with North Wake County going into District 4 – and South Wake County, including Cary, moving into District 2. This seems to make sense not only for geographic compactness but also the makeup of the population certainly appears more homogeneous with the Triangle and 3 major Universities together. I regret that this has not made some of my good friends from Wake County happy, but I would like to point out that the other major counties, Guilford, Forsyth, and Mecklenburg, are all divided and represented by 2 Congressman and that is not all bad. Major metropolitan areas have a lot of needs unique to their area and having 2 Congressman working together for your county can be very positive.

[*4] So, to close, I ask each of you to look at what we have done as to a total Plan for our State - again, taking into consideration the directives we have from both the Justice Department, the Court, the incumbency issue and all the other factors. Please keep in mind all the many other factors we have had pulling on us in doing this job. Those of us involved have

done our dead level best to agree on a Plan that both sides of the aisle in each Chamber can support. Our alternative after next Tuesday will be to turn this matter over to the three judge panel to do our jobs. I am hopeful that we can forget the partisanship we may have on this issue and let's do this job that the Constitution directs us to do and not have to ask the Court to help us. I really don't think any of us want to send that kind of message to the citizens across North Carolina.

Please note that the bill also provides a back up plan that goes to 0% population variance if the Court should rule the Plan unconstitutional because of the very small variance we have between Districts. It will then divide 12 precincts in lieu of 2 to meet this requirement. Again, this is only in the event we need to go to 0% population, which most of us do not believe we will need to do.

Mr. Speaker, Representative Sutton will offer an Amendment that makes a slight change in Robeson County that has been agreed to by all parties. It had been agreed to earlier, but somehow got changed in the final Plan approved in Committee yesterday, and I apologize for that.

I understand that other Amendments will be offered and even though I want each Member offering an Amendment to know that I respect their reason for doing it, I must ask my fellow Members to please keep the Plan in tact. If one change is made, other than Representative Sutton, we will begin to unravel weeks of intense negotiations and agreements that have happened in small steps along the way. Please understand that I can appreciate the reason for the Amendments being offered, but I must ask both sides to please defeat them to protect the

integrity of the overall Plan so that we can get it approved in both bodies.

Thank you.

* * *

[*10] Representative Daughtry: Thank you Mr. Speaker. I hope this body will vote against this Amendment. No one has worked harder in a more difficult job than Representative McMahan has done in trying to work out with the Senate -- and there are two bodies by the way -- us and them -- and they would have liked very much to have drawn Districts that would have 7 Democrats and 5 Republicans. Likewise, we would like to have 7 Republicans and 5 Democrats, but we have 6 and 6 and our agreement is that we talked to the incumbents about these Plans. At the same time, try to make them more compact, have communities together as best we can with commonalties of interest. **[*11]** This Plan has not been approved by the Senate. This Amendment would simply set us back and ultimately require Federal Judges to reapportion our State at a time when we don't need that to occur. I urge you to vote against this Amendment. Vote for the Plan that has been worked on for eight weeks -- is a very delicate balance. I realize that many of you find it distasteful to see the way the Districts have been drawn, but under the circumstances -- the way the makeup of these bodies are -- it is the best that Representative McMahan and Senator Cooper could do based on these circumstances. Please vote against the Amendment. Thank you.

Speaker Brubaker: Further discussion -- further debate. If not, the question before the House is the Amendment sent forward from the Gentleman from Durham. Those in favor will vote aye -- opposed no -- the Clerk will open the vote. The Clerk will lock the machine and record the vote -- 30 in the affirmative -- 87 in the negative -- the Amendment fails. For what purpose does the Gentleman from Durham arise.

Representative Michaux: I have an Amendment to send forward.

Speaker Brubaker: The Gentleman may send forward his Amendment. The Clerk will read the Amendment.

Clerk: Representative Michaux moves to amend the bill on page 2, line 22 through page 17, line 10.

Speaker Brubaker: The Chair recognizes the Gentleman from Durham to explain the Amendment.

Representative Michaux: Mr. Speaker and Ladies and Gentlemen of the House, this is almost the same Amendment as before except some of the percentages have been changed. Let me tell you what is wrong with the Plan that has been brought out here. They talk about the 12th District being held constitutional because it is not now a Majority/Minority District. The Court has said in its ruling that race cannot be a predominate factor -- other factors have to be taken into consideration, and that would be a community of interest, and even the shape that Justice Sandra Day O'Connor called attention to in here opinion. All you have done with the 12th District in this bill is knock **[*12]** sixty miles off of it. That's basically all that is done, because if you look at the configuration of the 12th District on the map that the Committee sent forth, you will see that it is basically the same

configuration with sixty miles lopped off of it. The Amendment takes the 12th District – broadens it to a degree and yet keeps an Influence District there where the Representative -- the incumbent Representative -- is in a good position to win that District. There are two other Districts, so I would urge you to adopt this Amendment.

* * *

[*16] Representative Wainwright: Thank you Representative McMahan. In your opinion -- in this present Plan that is being presented today - do you feel that you have - the Committee has - truly set out any Minority Districts in this Plan - a true realistic Minority District.

Representative McMahan: We certainly feel that District 1 - where it has been based on the old data - and I think the current data would even be more - we have more than 50% of the population as minorities in District 1. I certainly do believe that would qualify as a Majority/Minority District. As far as District 12 -- I believe, again, that Congressman Mel Watt is very comfortable and anyone else that might choose as a minority to run in that District should feel very, very comfortable -- when there is 46.5% of the people in that District are also minorities -- that they could win. So, I think we've done our very, very best considering the Justice Department's ruling, the Court's ruling - we've done our very best to try to create two Districts that certainly do have racial fairness, and of course you have to keep in mind Representative Wainwright that we were instructed by the Court not to depend

solely on race. It can only be a factor -- along with other factors -- and that's what we've tried to do.

Representative Wainwright: Follow up Mr. Speaker.

Speaker Brubaker: Does the Gentleman yield - the Gentleman yields.

Representative Wainwright: Certainly I want to commend you for your efforts and the efforts of the Committee in putting forth this Plan Representative McMahan. If you remove the element of incumbency out of this Plan, do you really think that a minority would have a fair chance of being elected especially in the District that I was in, and that takes me out of the District now and puts me in a different District in this Plan. Do you believe that a minority will have a fair chance of being elected if you remove the incumbency element out of it.

Representative McMahan: Absolutely without any question.

* * *

[*23] [Representative McMahan] . . . I am confident that we have done our best – our dead level best – to draw two Districts that are fair racially and do have one of them the majority of the population and the other one over 46%, and that's the very best we could do on both sides, and we looked at this very, very closely – obviously – and the very best we could do and yet create Districts that we felt would be acceptable to the Department of Justice and to the Courts.

[This page intentionally left blank.]

SECTION 97C-28F-4F(2) (EXCERPTS)

FLOOR DEBATE ON CONGRESSIONAL REDISTRICTING SENATE CHAMBER THURSDAY, MARCH 27, 1997

[*3] **Reading Clerk**: **H.B. 586**, A BILL TO BE ENTITLED AN ACT TO DIVIDE NORTH CAROLINA INTO TWELVE CONGRESSIONAL DISTRICTS, reported favorably.

President: Senator Cooper is recognized to explain the bill.

Senator Cooper: Thank you, Mr. President, members of the Senate. Today we have a congressional redistricting plan that splits forty-six (46) counties, that has six (6) counties which have three members of Congress, and which splits over eight [*sic*] (80) precincts. The plan we have today has some social merit. As a result of this plan, for the first time in many, many years, we have two minority members of Congress as a result of the current plan. However, we have a plan that is a geographic mess. I have, for your viewing pleasure if you want to call it that, had placed on your desks a copy of the current map so that you can see how difficult it is for people to know in which Congressional district they reside. Last year, the United States Supreme Court ordered the Legislature to redraw the map as a result of the 12th Congressional District being declared unconstitutional. Now there are arguments for and against this decision. In fact, the Court found it close. It was a 5-4 decision and one of those Justices sort of wavered back and forth - Justice O'Connor. But the result was that the 12th District was held unconstitutional by a 5-4 decision and we were ordered by April 1 to come up with a new map. When

this process began, we had a House controlled by the Republican Party and a Senate controlled by the [*4] Democratic Party and people were saying that it couldn't be done, that we could not reach an agreement. In fact, other states which had been ordered by the Court to redraw their plans under similar circumstances, other states have been unable to agree on a plan. I want to commend all of those who have been involved in this process because we have agreed on a plan - a plan that is fair and workable. You have the plan on your desk, it is entitled "97 House/Senate Plan A." This plan reduces the number of counties that are split from forty-five (45) [*sic*] to twenty-two (22). There are now only 22 counties split under this plan. It reduces the number of precincts split from over eighty (80) to two (2) and those two precincts have special circumstances with satellite annexations, etc. and are split under most other plans as well. You have a plan which provides for geographic compactness, provides for consideration of community of interest, and provides for fair partisan balance. I think that all of the congressional districts would be competitive. However, it is likely that, if political fortunes remain the same, that we would end up with a plan that would elect six Democrats and six Republicans. We said from the beginning in the Senate that in 1996 the people made a decision to elect six members of Congress from the Democratic Party and six members of Congress from the Republican Party and we should not use court-ordered redistricting to alter that result. Therefore, we've come up with the plan that you see before you. In considering the plan, we looked at community of interest, looking at keeping precincts whole, at keeping counties whole as much as possible. We looked at making sure

that no counties had more than two members of Congress representing the county. We looked at racial fairness. Let me tell you a little bit about the 1st and the 12th Districts because the unconstitutionality of the 12th District is the reason why we are here. You have the statistics on your desk, but the 1st District is majority minority, total population 50.27%. [*5] However, let me emphasize that race was not the predominate factor in drawing the 1st Congressional District. We have a district that has ten whole counties and ten split counties. It's a district which respects the rural agrarian nature of the northeast. It is a district which, I believe, that a minority member of Congress or even a minority challenger would have an excellent chance to be re-elected, but I believe the 1st District not only is constitutional, but also complies with the Voting Rights Act which is also a responsibility we have with this plan to have it pre-cleared by the Justice Department and held constitutional by the Courts. The 12th District is almost 47% majority minority. Currently, the 12th District under our current plan is majority minority. I believe that this new 12th District is constitutional for several reasons. First, and maybe most importantly, when the Court struck down the 12th District it was because the 12th District was majority minority and it said that you cannot use race as the predominate factor in drawing the districts. Well guess what! The 12th District, under this plan, is not majority minority. Therefore, it is my opinion and the opinion of many lawyers that the test outlined in Shaw vs. Hunt will not even be triggered because it is not a majority minority district and you won't even look at the shape of the district in considering whether it is constitutional. That makes an eminent amount of sense because what is the cut-off point for when you

have the trigger of when a district looks ugly. I think that the court will not even use the shape test, if you will, on the 12th District because it is not majority minority. It is strong minority influence, and I believe that a minority would have an excellent chance of being elected under the 12th District. If, however, the court decides that the test is triggered for some reason and that we should look at the criteria outlined in Shaw vs. Hunt, you need to look at what the, how we have improved the shape of the 12th District. First, it is much more compact. It is 67% shorter in length **[*6]** than under the old plan and you see how the old plan stretches from Gastonia to Durham. You can drive the length of this district in two hours. It is the third shortest district in the entire State. It covers six (6) counties instead of ten (10), it connects the metropolitan area of Charlotte and the metropolitan area of the Triad. There is certainly a community of interest along that corridor, economic, social, and otherwise. It is much wider and it takes into consideration the incumbent and political balance. For all of those reasons, I believe that the 12th District will be held constitutional. Members of the Senate, redistricting is a difficult process - I don't want this job again, but I believe that we have been able to overcome partisan politics and we have been able to reach a plan that is fair to the people of North Carolina, and fair to all involved. The House agrees. Yesterday, the House voted unanimously in favor of this plan - 87-30. Of those 87 members who voted "yes", 52 were Republicans and 35 were Democrats. That is a good strong bipartisan show of support for this plan. I believe that this plan is acceptable to all of the members of Congress. There are a couple who have stated objections about the way that some area

had been moved around, but as far as the partisan nature of the districts is concerned, we have preserved the current partisan nature of each of the districts and for that reason, I think that all of the incumbents are satisfied. And let me emphasize to you that this is not an incumbent protection plan. This is a plan that attempts to preserve the partisan nature of each of the twelve districts as they now exist. I believe that we've done that with this plan. Members of the Senate, I encourage you to vote for this plan. We have a responsibility as a legislature to draw a plan. It's easier politically to say "let the courts do it", but that's rolling the dice. Number one, you don't know what you are going to get and, number two, it is shirking our responsibility as representatives of the people to do what the Court has **[*7]** ordered us to do. We may not like everything about the plan, there are some parts of the plan that I wish I could change, but the process of negotiations require give and take. That's what has happened here. I think we have a result that is fair and equitable for all of the people of North Carolina and I encourage your "yes" vote. Thank you.

* * *

[*21] **Senator Blust**: Let me first start out by saying that this is, this plan is and improvement over what we have now, no doubt about it. Senator Cooper has put in a lot of work on this. I admire his stamina sometimes, all the tasks he's been given, he seems to perform very well in meeting with . . . . of them, but I think I am falling into a familiar role here, I guess I am starting to find any role on the team. I think more and more I am becoming the little boy who in the story, "The Emperor's

New Clothes", had to get up and say when no else dared to tell the Emperor that he was not wearing anything because he had been snuckered(?) by some con men tailors, a little kid not knowing what he was doing said in public one day that the Emperor didn't have any clothes. At that point, once it was said everybody was free to realize that, but my problem with this plan is **[*22]** fundamental and I just don't think - in anything you come out with a good result unless you have good fundamentals. Everybody now is excited about the Final Four and the Tarheels have been practicing all week, but most of their practice time, even at this level of competition, is drilling the fundamentals and drilling the fundamentals, because if you forget them everything else crashes down and the major weakness with this plan, quite frankly, and I think everybody here knows this is the truth whether they will get up and admit it or not it's not going to make a difference, is the fundamental predicate was on protecting the current twelve. And that was the only way to really get a deal between the parties on this and get support for it and there were just two factors that went into developing this plan - one was protecting incumbents, the other was race. We might as well face that. Part of the problem is that the Courts have put, I think, ridiculous constraints on this process. Some of the problem lies in the fellows in the black robes, but we come to this Body and I think we sometimes lose our way, we forget the big picture, forget what it's all about and I just want to quote from the Constitution of this State that sets up this Body and sets up our government and its says this in Article 1, Section 2 called "Sovereignty of the People - All political power is vested in and derived from the people; all government of right originates from the people, is founded

upon their will only, and is instituted solely for the good of the whole" and I think concocting a plan based mainly on protecting twelve out of seven million (7,000,000) citizens means that the plan can't be a good one. Logic teaches that if the premise of something is wrong, all the predicates that follow from that flawed premise aren't really logical and here we have a premise that's wrong and I think we forget this fundamental point about our government being for the people and the people having power, because what happens is politicians win an election **[*23]** and suddenly they seem to think they become entitled to their seats for as long as they want to have them. That's what we have, we have it at every level, we have it here in our district system, we have it in Congress, if once you are elected you search, there's a science behind this, I hear people arguing over I want this precinct, I want that precinct, solely designed to make it easier for them to retain their seat and we argued in here the other day on a bill about tenure. I think what we have in our redistricting is a form of political tenure and two of these seats, in 1994 the public voted one way and in 1996 another. So now in 1997 that we've got an opportunity because of a court decision to redo the districts, we are gonna do it to solidify what happened in "[*sic*] 96 so that in '98 maybe a difference public can't see it differently. You know, sometimes I talk to people and talk about government and try to keep it on the basics and I have found that you can hold up a map of our districts and you don't even have to say any more when you are trying to make the point that government has gone astray somewhat, people look at these things and they can see it without any need for anything more and we have been talking about districts here. Someone

said that one of the districts is too long, look at District 5, here. It goes along the Virginia border forever. No one tried to correct that and I just don't see any rational plan to make districts concise to where they serve the people in the community and I'll just give one example. There's actually a precinct in Mecklenburg that is split between everybody else in the precinct and one person, one house, and I'm told, wait a second, it's not one house, there is some industrial area around it and that had to be split in order to keep one of these districts contiguous. That is the kind of . . . . we go through here and someone, Senator Hoyle, mentioned that 51 House Republicans voted for this as if that is some kind of . . . . between House Republicans and Senate Republicans. Well, I don't know how to explain that, I don't think when **[*24]** we are pointing the fingers over district there's a, any party can say anything about the other and have totally clean hands, but I do fear that some of my brethren in the House may have lost their way and bought into this, bought into this idea that we've got to protect the current twelve and I just think that's a fundamental flaw and I hear some chuckling and maybe I am too naive for this job, I decided to become a Republican because I thought we, as Republicans, believed in a certain set of principles and ideals and when I see one of the fundamental ideals behind government being violated, I just can't bring myself to support it. Thank you.

* * *

[*24] Senator Lucas: Senator Cooper, many of my constituents were concerned about their not being placed with District 1. Can you explain to me why that was not possible?

Senator Cooper: Thank you, Senator Lucas, I know that there are numerous members of the community of Durham, particularly in a minority community of Durham, who are concerned about this plan. **[*25]** Currently in the 12th District is where the minority community of Durham resides. Unfortunately, that is the very tale end of the 12th District and I think everyone understands that in order to draw a map that is constitutional, you cannot include Durham in the 12th District and I think that, although the wishes and the desires may be there, it's not possible. The reason that, really twofold, as to why we did not go with the Durham County and pick up the minority portion of Durham County and put it in the 1st, the first reason is that we very much wanted to retain the rural agrarian nature of the northeastern North Carolina 1st District. That was very important. The court talks a lot about communities of interest and when you put urban Durham in with the rest of rural northeastern North Carolina, you run into the same problems that you run into with Senator Cochrane's amendment and you can . . . . of the courts, and secondly, I do think if you did that then it would be clear that race would have been the predominate factor in drawing the 1st District. For those two reasons, it was not done.

[This page intentionally left blank.]

Supreme Court, U.S.
FILED
SEP 7 - 2000
CLERK

Nos. 99-1864 and 99-1865

In the

Supreme Court of the United States

JAMES B. HUNT, JR., *et al.*,

Appellants,

and

ALFRED SMALLWOOD, *et al,*

Appellant-Intervenors,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

JOINT APPENDIX
Volume II of II
(pages 483 through 823)

[Counsel listed on inside front cover]

APPEAL DOCKETED MAY 23, 2000
PROBABLE JURISDICTION NOTED JUNE 26, 2000

MICHAEL F. EASLEY
NC Attorney General
Tiare B. Smiley*
Norma S. Harrell
NC Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
Telephone: (919) 716-6900

Counsel for Appellants

Adam Stein
Ferguson Stein Wallas
Adkins Gresham & Sumter
312 W. Franklin Street
Chapel Hill, NC 27514
Telephone: (919) 933-5300

Todd Cox*
NAACP Legal Defense &
Educational Fund, Inc.
1444 I Street NW
Washington, DC 20005
Telephone: (202) 682-1300

Counsel for Appellant-
Intervenors

Robinson O. Everett*
Seth Neyhart
Everett & Everett
Post Office Box 586
Durham, NC 27702
Telephone: (919) 682-5691

Martin B. McGee
Williams, Boger, Grady,
Davis & Tuttle, P.A.
Post Office Box 2
Kannapolis, NC 28082
Telephone: (704) 932-3157

Douglas E. Markham
Post Office Box 130923
Houston, TX 77219-0923
Telephone: (713) 655-8700

Counsel for Appellees

*Counsel of Record

TABLE OF CONTENTS

VOLUME I

Chronological List of Relevant Docket Entries 1

Stipulations from Pre-Trial Order (excerpts) 15

TRIAL TRANSCRIPT EXCERPTS

Opening Statement of Tiare B. Smiley 23

Hamilton Horton 25

Steven Ray Wood 33

John Hush Weatherly 45

Reuben Oscar Everett 55

J. H. Froelich 65

Neil Carson Williams 69

Dan Frey 77

Dr. Ronald E. Weber 81

Roy A. Cooper, III 179

W. Edwin McMahan 231

Dr. David W. Peterson 245

Gerry Cohen 261

Closing Argument of Adam Stein 269

EXHIBITS

Type P Divergent Segments (Exhibit 23) 271

Type R Divergent Segments (Exhibit 24) 273

Summary of Divergent Precincts and Segments
(Exhibit 25) 275

Declaration of Ronald E. Weber (excerpts)
(Exhibit 47) 277

February 10, 1997 E-mail from Gerry Cohen
(Exhibit 58) 369

North Carolina Section 5 Submission for 1997
Congressional Redistricting Plan
(Exhibit 100) (excerpts)

Information Supporting North Carolina's
Section 5 Submission (excerpts) 371

Section 97C-28F-4D(2) Senate Committee
Minutes (February 20, 1997) 391

Section 97C-28F-4D(3) Senate Committee
Minutes (March 19, 1997) 405

Section 97C-28F-4E(1) House Committee
Minutes (February 12, 1997) (excerpts) 439

Section 97C-28F-4E(2) House Committee

Minutes (February 25, 1997) 443

Section 97C-28F-4E(3) House Committee
Minutes (March 19, 1997) (excerpts) 453

Section 97C-28F-4E(4) House Committee
Minutes (March 25, 1997) (excerpts) 459

Section 97C-28F-4F(1) House Floor
Debate (excerpts) 463

Section 97C-28F-4F(2) Senate Floor
Debate) (excerpts) 473

VOLUME II

Map of Precincts by Percent of Population Black
with Congressional District Line Overlay
(Exhibit 106) 483

Forsyth Precincts by Percent of Population Black
with Democratic Registration Values
(Exhibit 108) 484

North Carolina Counties by Percent of Population
Black with 12th Congressional District Overlay
(Exhibit 124) 485

Congressional District 12 - 1992 versus 1997
(Exhibit 139) 486

Forsyth County Precinct Map (Exhibit 143) 487

Guilford County Precinct Map (Exhibit 144) 488

District 12 Region Precincts by Percent Democrat Vote in 1988 Court of Appeals Race (Exhibit 253) 489

Forsyth County Voter Precincts by Percent Democratic Vote in 1988 COA Race (Exhibit 255) 490

Guilford County Precincts by Percent Democratic Vote in 1988 COA Race (Exhibit 256) 491

Mecklenburg County Precincts by Percent Democratic Vote in 1988 COA Race (Exhibit 258) 492

District 12 Region Precincts by Percent Democratic Vote in 1990 Senate Race (Exhibit 263) 493

Forsyth County Voter Precincts by Percent Democrat Vote in 1990 Senate Race (Exhibit 265) 494

Guilford County Voter Precincts by Percent Democrat Vote in 1990 Senate Race (Exhibit 266) 495

Mecklenburg County Voter Precincts by Percent Democrat Vote in 1990 Senate Race (Exhibit 268) 496

North Carolina 1990 Population Density (By Block Group) (Exhibit 270) 497

Map of 1980s Congressional Districts in North Carolina (Exhibit 288A) 498

Map of [1970s] Congressional Districts (11 Districts) (Exhibit 289) 499

Comparative Map[s] of the 12th District, from 98C-27A-3C (1998 Section 5 Submission) (Exhibit 305)

1992 Congressional Plan 500

97 House/Senate Plan A 501

98 Congressional Plan A 502

A Chronology on North Carolina Redistricting in the 1990s (Exhibit 306) (excerpts) 503

Proportion of Precincts in Six Counties That Are in Congressional District 12, 1997 Plan (Exhibit 309) 515

Photograph of Default Screen in Plan90 (Exhibit 402) 517

Photograph of Plan90 Screen Showing County with Precinct with Precinct Lines and Data Window Sized as Generally Used (Exhibit 405) 518

Photograph of Plan 90 Screen Showing Democrat Percentage Labels (Exhibit 411) 519

Photograph of Plan90 Screen Showing Data Window for a Precinct (Exhibit 416) 520

An Evaluation of North Carolina's 1998 Congressional Districts [1997 Plan], Gerald R. Webster, PhD (Exhibit 421) (excerpts) 521

Addendum to "An Evaluation of North Carolina's 1998 Congressional Districts [1997 Plan]," Gerald R. Webster, PhD (Exhibit 426) (excerpts) 549

Third Affidavit of David W. Peterson, PhD (Exhibit 429) 555

Guilford County Precincts "Excluded" By Elm and Lee Streets (Exhibit 437) 575

DEPOSITION TRANSCRIPT EXCERPTS

Don Nichols Baker 577

Gerry Farmer Cohen 585

Roy Asberry Cooper, III 641

J. H. Froelich 671

Linwood Lee Jones 687

William Edwin McMahan 697

David Peterson, PhD 711

Ronald E. Weber, PhD 743

Gerald R. Webster, PhD 765

Leslie Winner 769

OTHER

Materials from *Shaw v. Hunt*, No. 92-202-CIV-5-BR

Defendants' Motion to Consolidate, October 14, 1997 791

Defendants' Memorandum in Support of Motion to Consolidate, October 14, 1997 797

Order [denying motion to consolidate], October 16, 1997 803

Trial Testimony of Gerry Cohèn (excerpts) 805

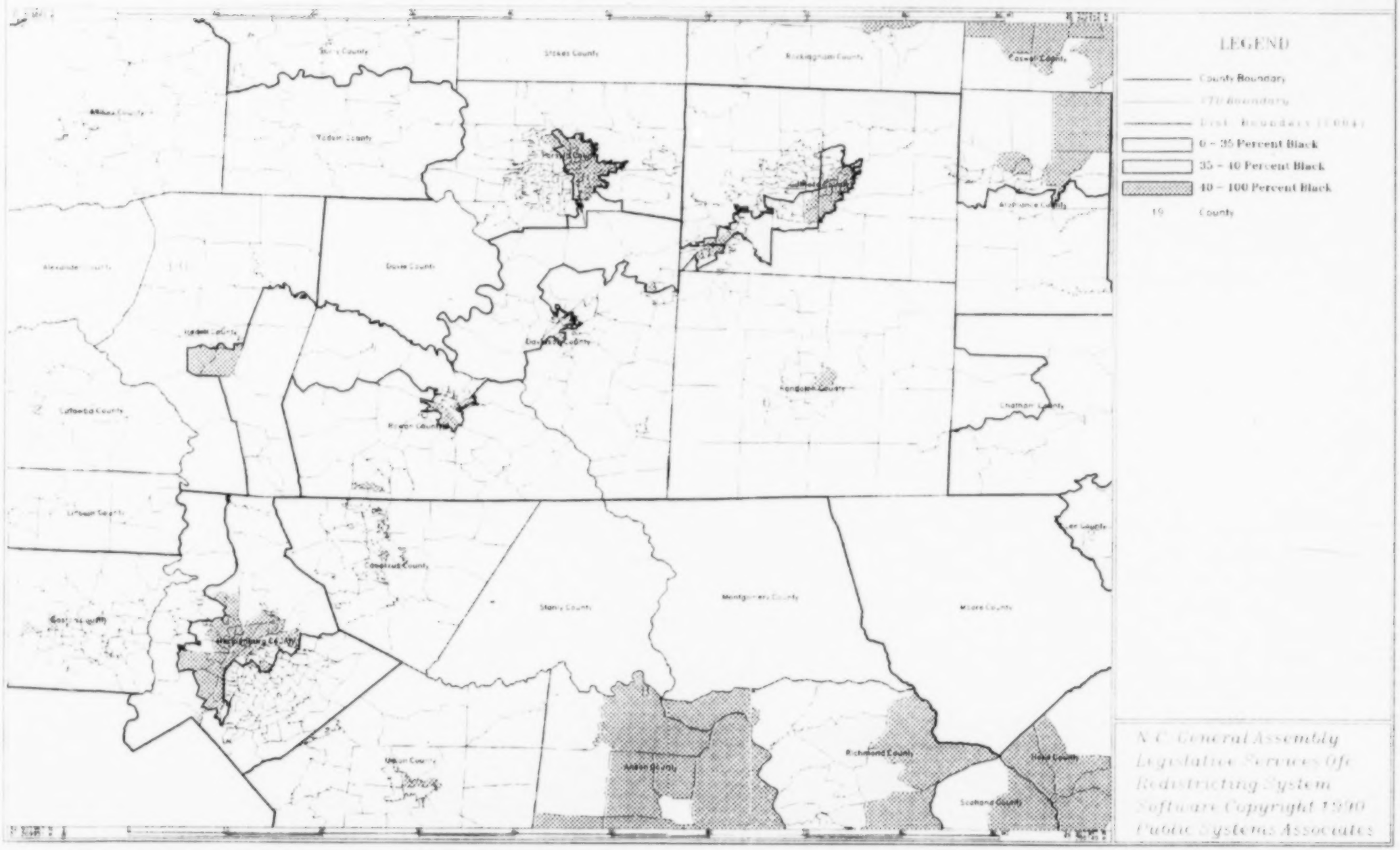
Deposition Transcript of Gerry Cohen (excerpts) 815

Materials from *Pope v. Blue*, No. 3:92-CV-71-PR

Deposition Transcript of Gerry Cohen (excerpts) 821

Precincts by Percent of Population Black with Congressional District Line Overlay

March 17, 1998

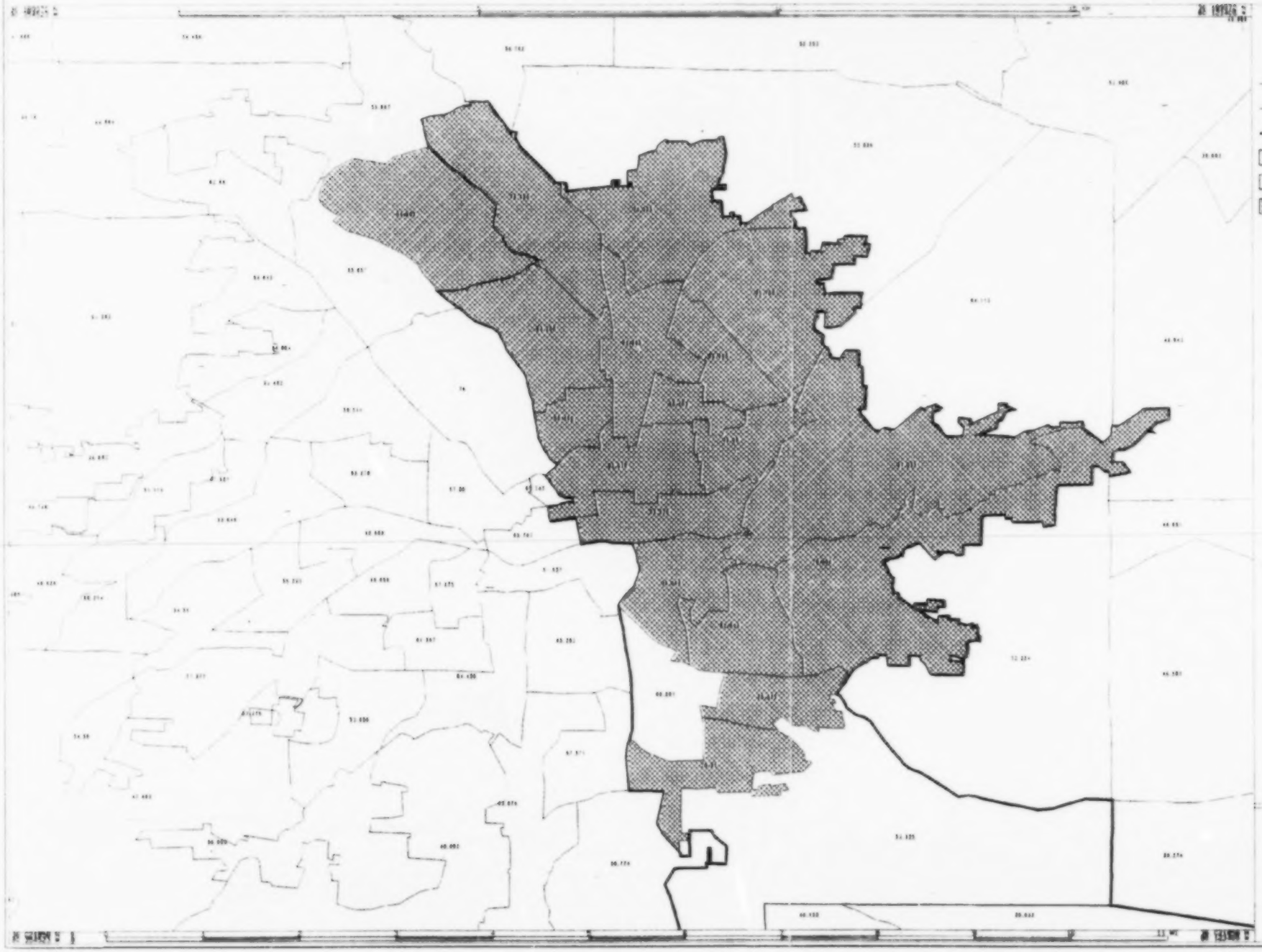


JOINT EXHIBIT

BEST AVAILABLE COPY

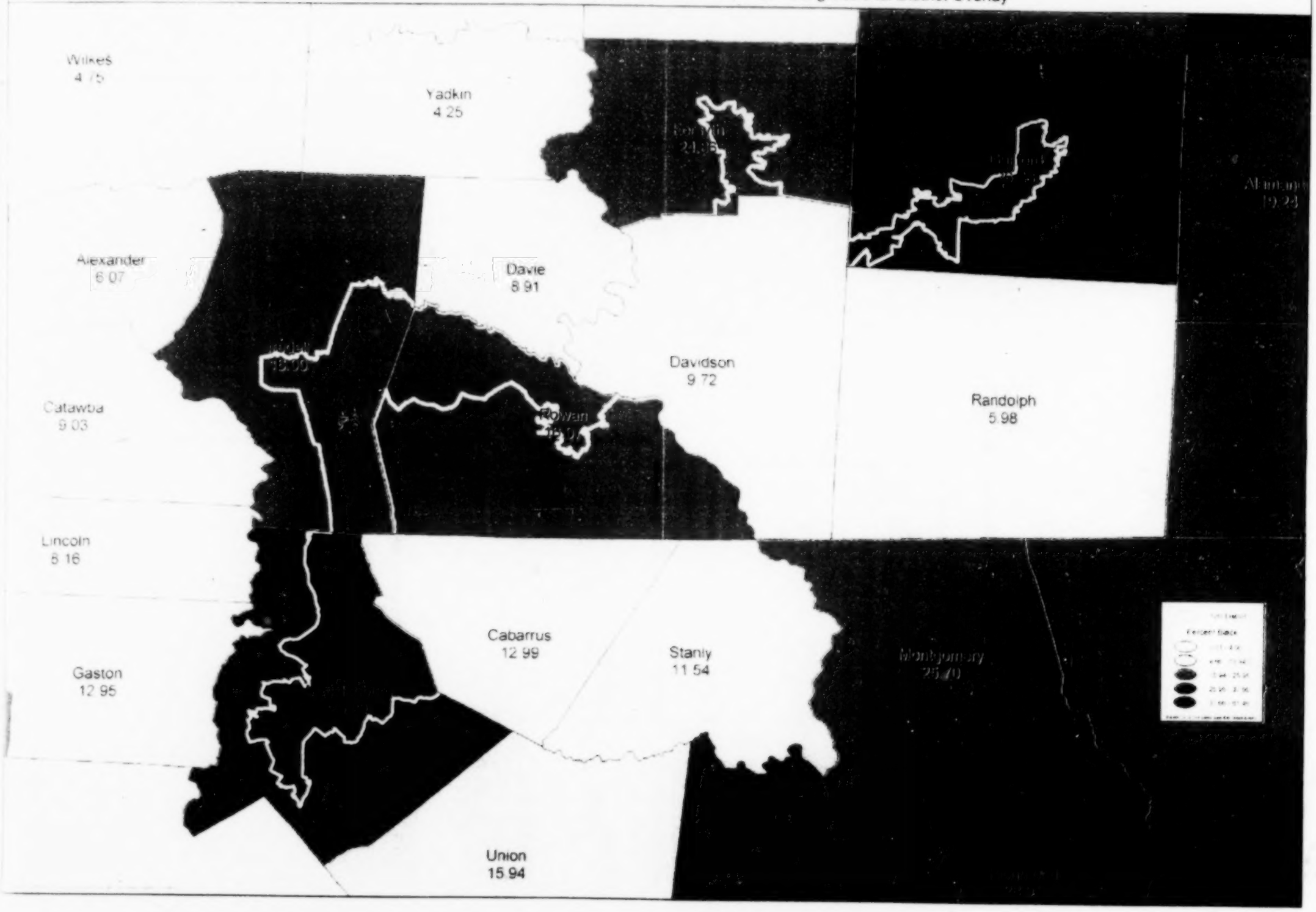
Forsyth Precincts by Percent of Population Black with Democratic Registration Values

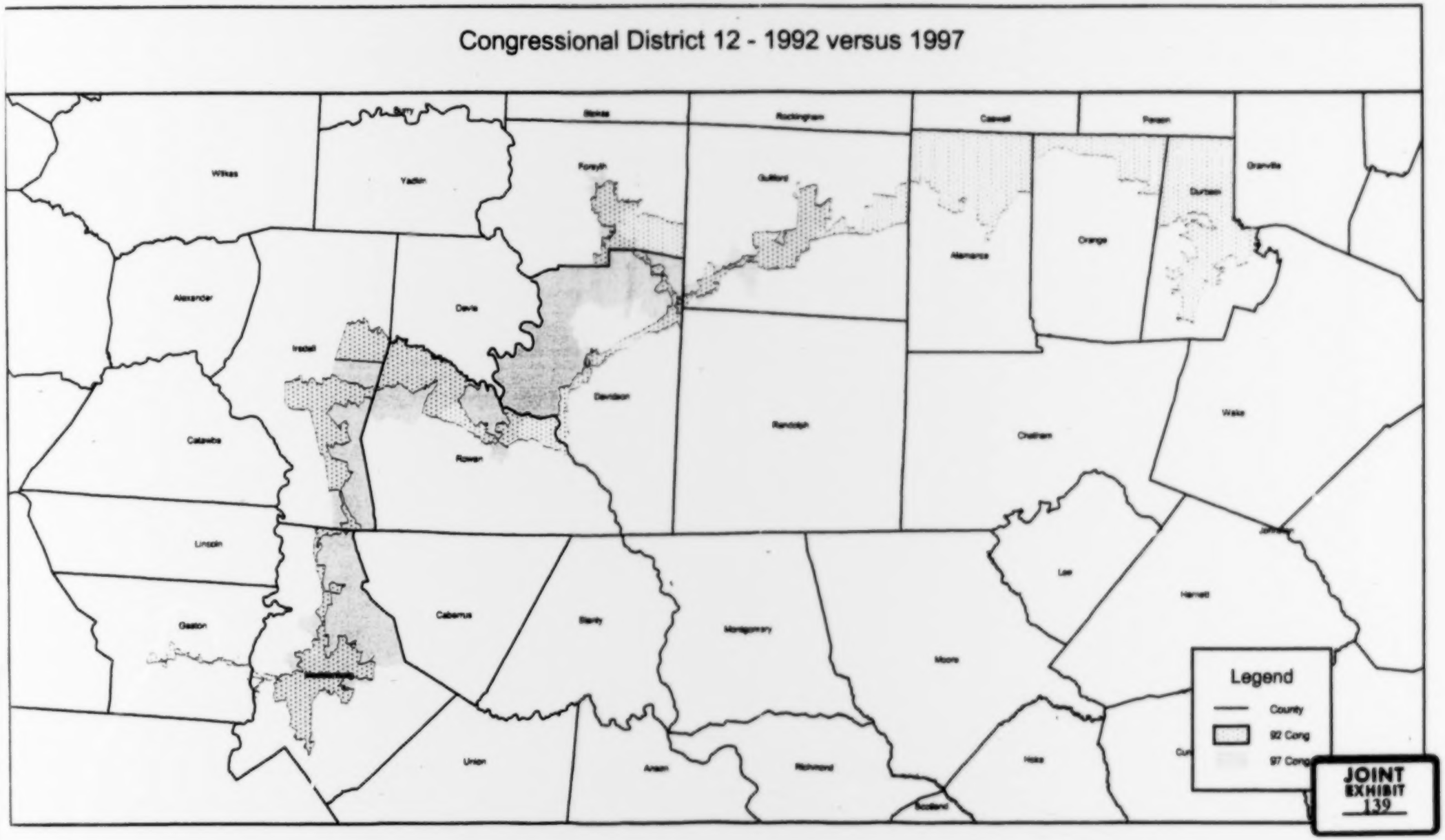
March 18, 1998



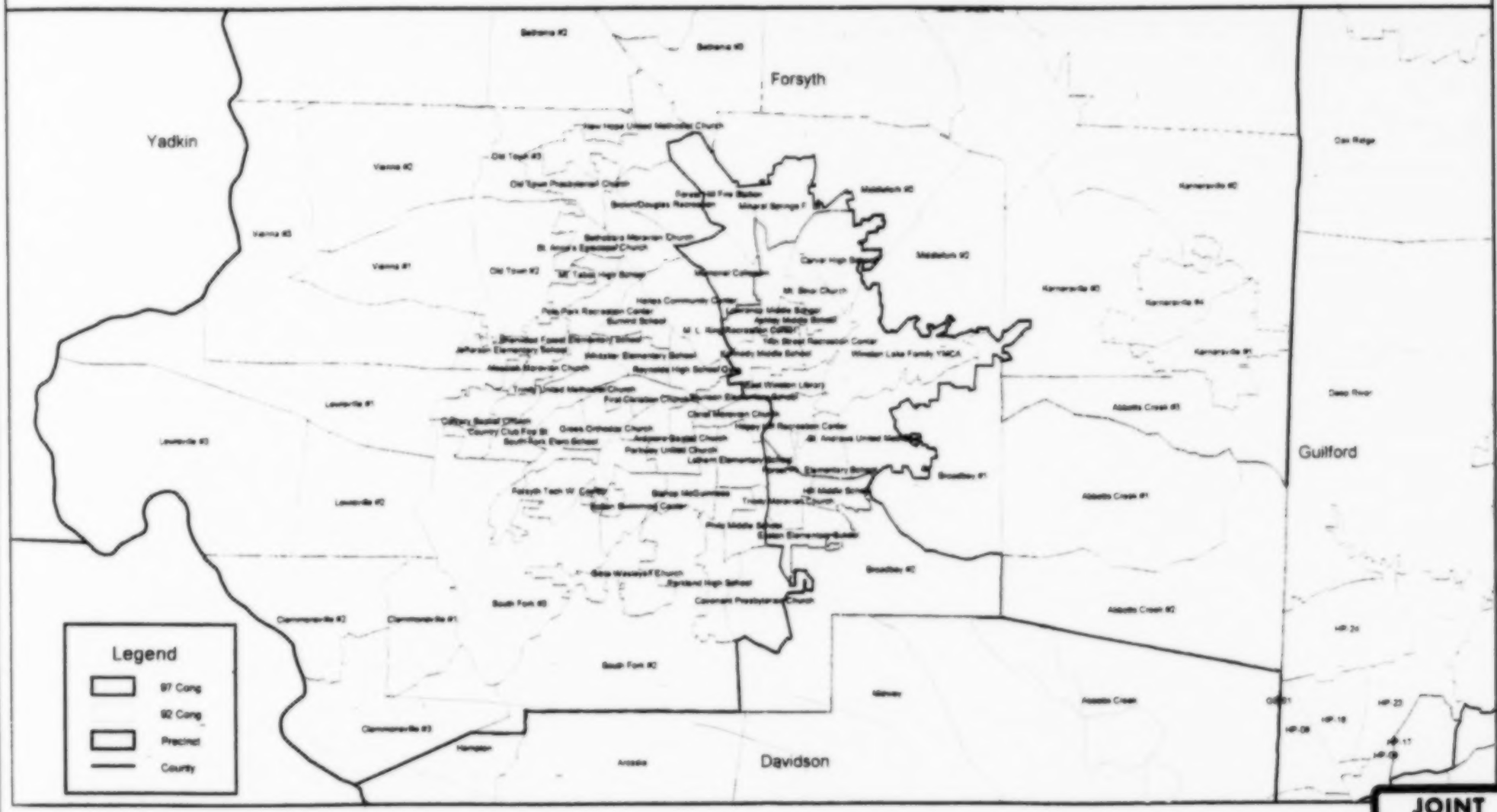
N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates

North Carolina Counties by Percent of Population Black with 12th Congressional District Overlay



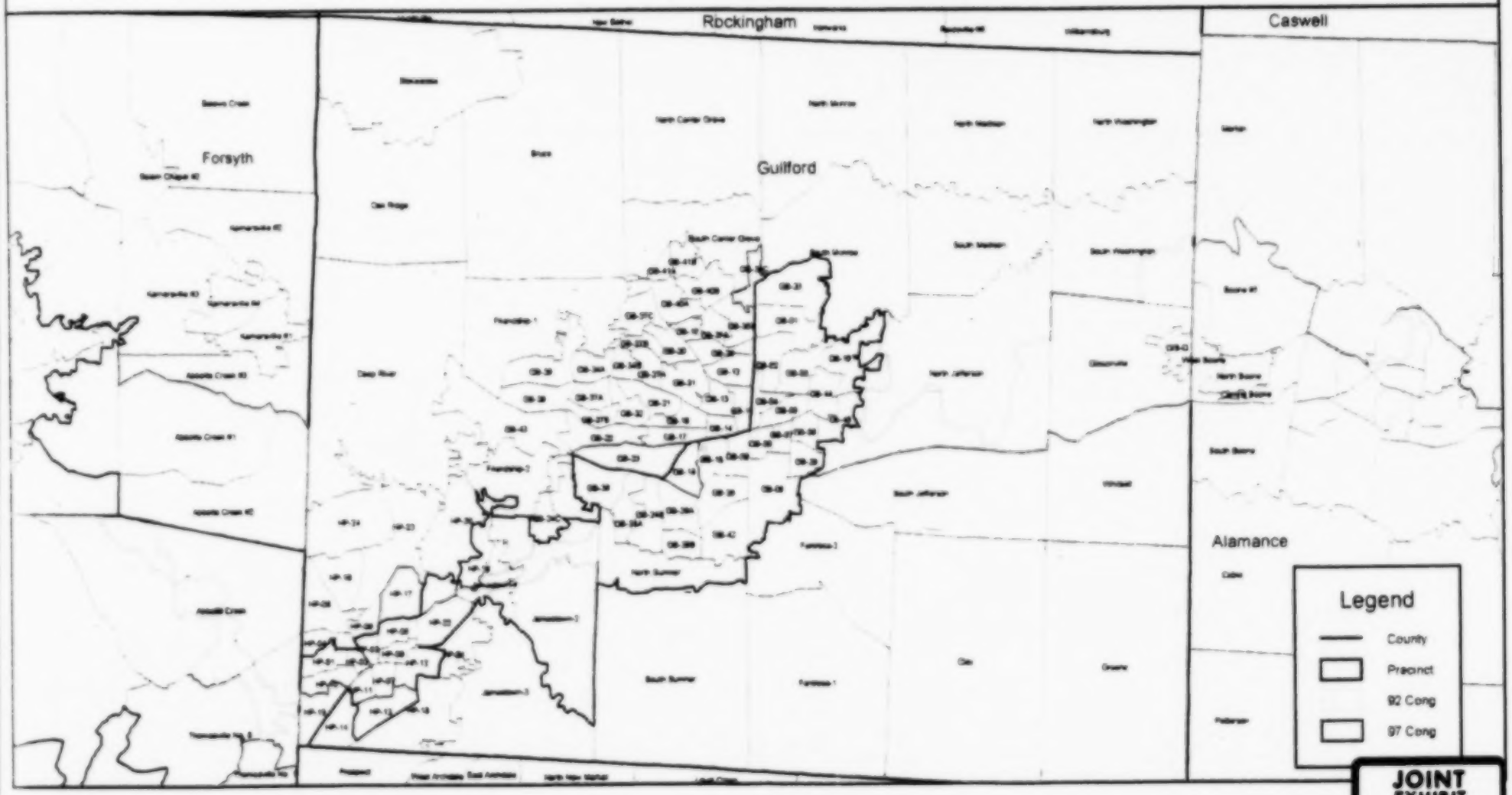

Congressional District 12 - 1992 versus 1997
Wilkes
Yadkin
Forsyth
Guilford
Rockingham
Caswell
Person
Granville
Alexander
Davie
Iredell
Davidson
Randolph
Alamance
Orange
Durham
Caldwell
Catawba
Rowan
Cleveland
Lincoln
Gaston
Cabarrus
Stanly
Montgomery
Moore
Lee
Harnett
Legend
County
92 Cong
97 Cong
Union
Anson
Richmond
Scotland
Hoke
JOINT EXHIBIT 139

Forsyth County Precinct Map



JOINT EXHIBIT 143

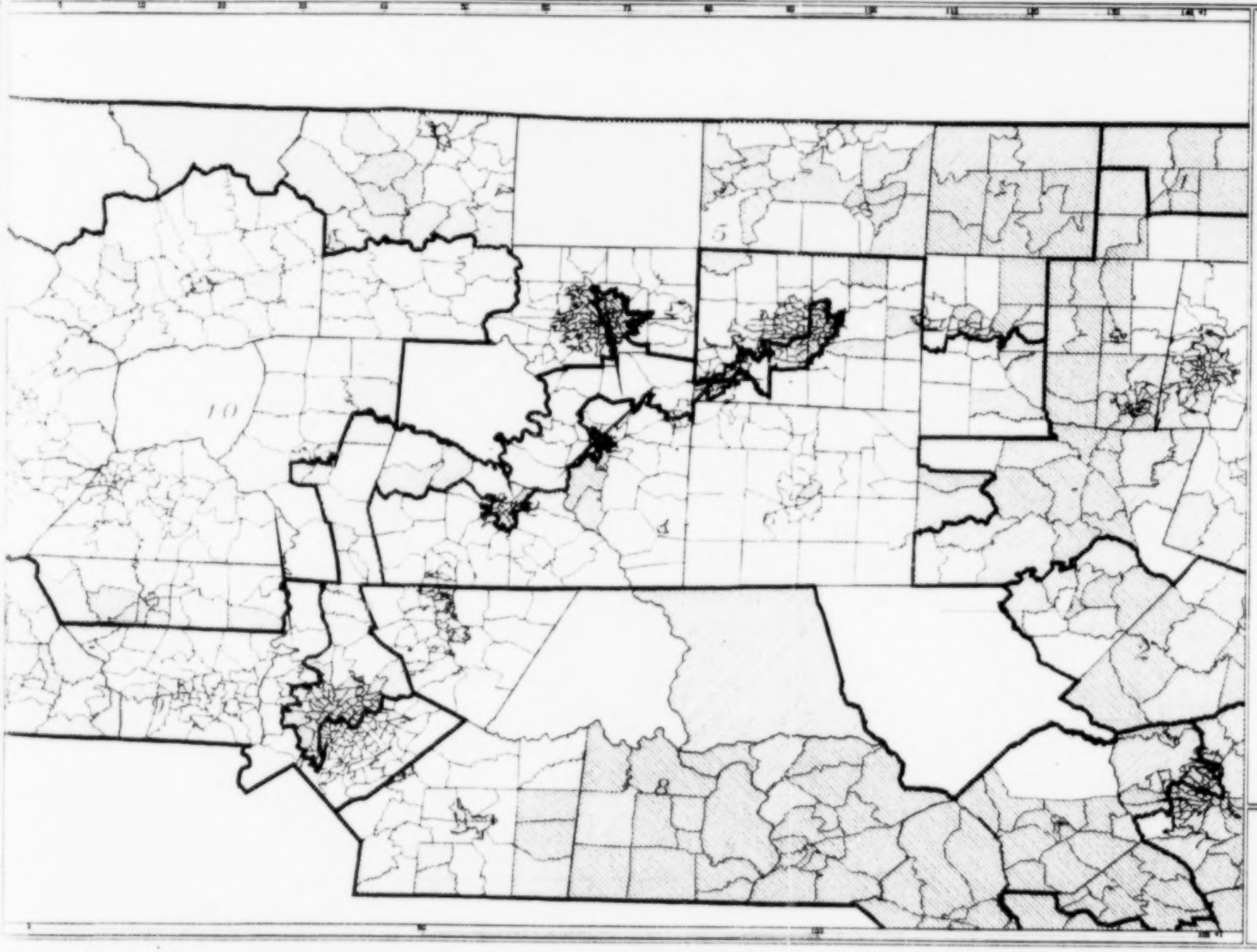
Guilford County Precinct Map



JOINT EXHIBIT 144

1997 Congressional Plan – District 12
Region Precincts by Percent Democrat
Vote in 1988 COA Race

September 7, 1999

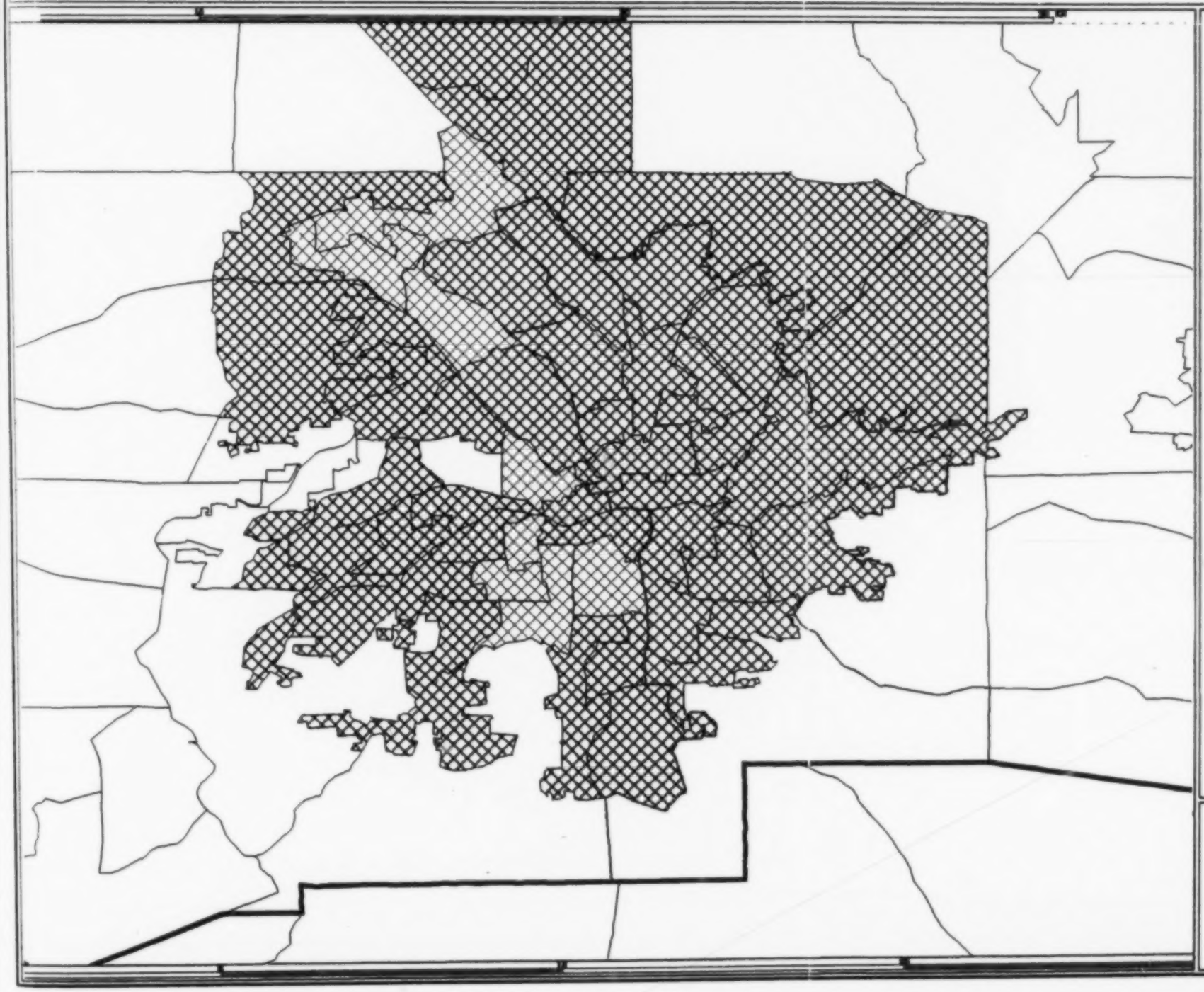


LEGEND

- County Boundary
- VTD Boundary
- Dist. Boundary (C004)
- 0 – 39.9% Democrat
- 40 – 49.9% Democrat
- 50 – 59.9% Democrat
- 60 – 100% Democrat

N.C. General Assembly
Legislative Services Off.
Redistricting System
Software Copyright 1990
Public Systems Associates

1997 Congressional Plan – Forsyth County
Voter Precincts by Percent Democratic Vote in 1988 COA Race

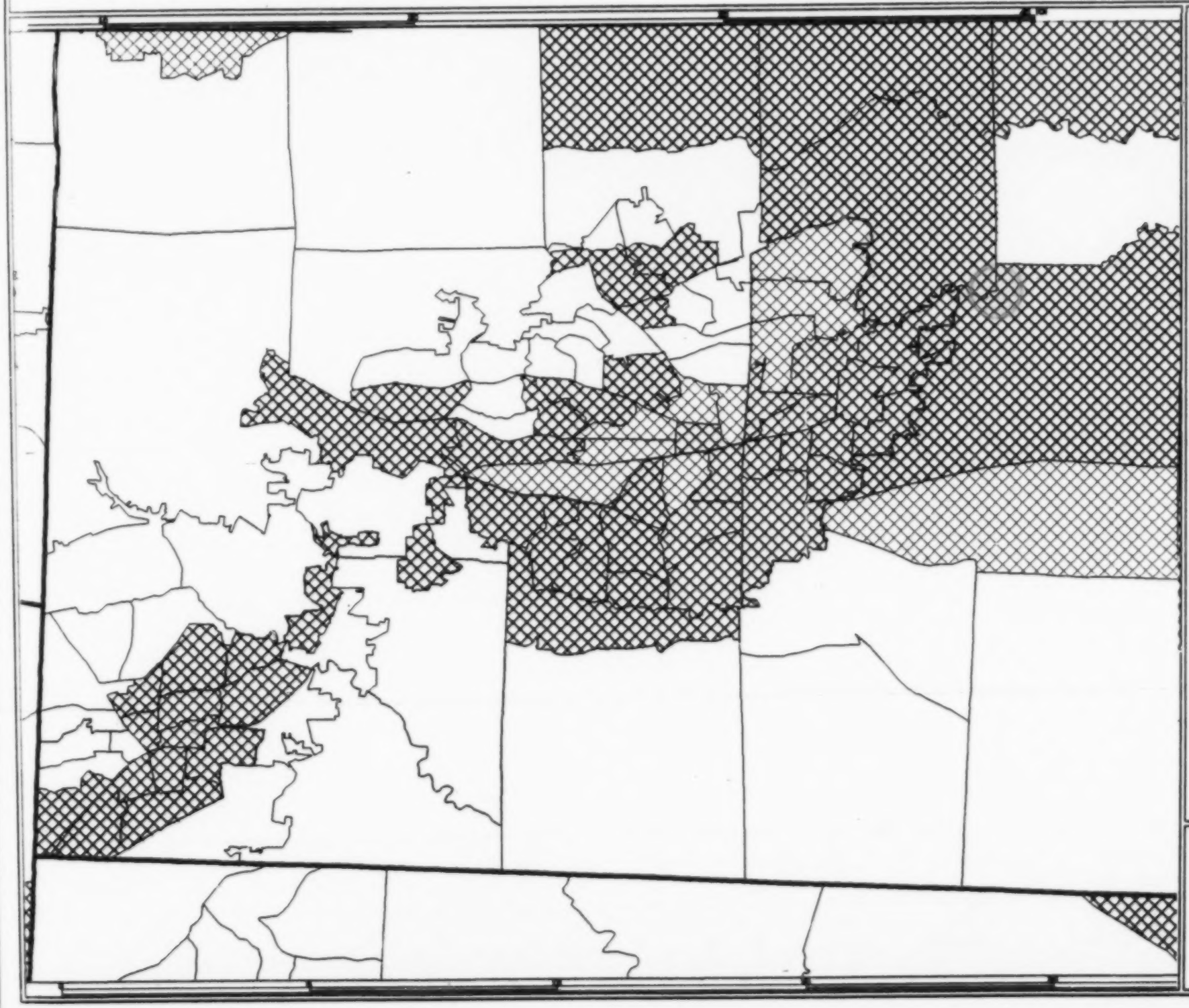


LEGEND

- County Boundary
- VTD Boundary
- *Dist. Boundary (C004)*
- 0 – 39.9% Democrat
- 40 – 49.9% Democrat
- 50 – 59.9% Democrat
- 60 – 100% Democrat

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates

1997 Congressional Plan – Guilford County
Voter Precincts by Percent Democratic Vote in 1988 COA Race

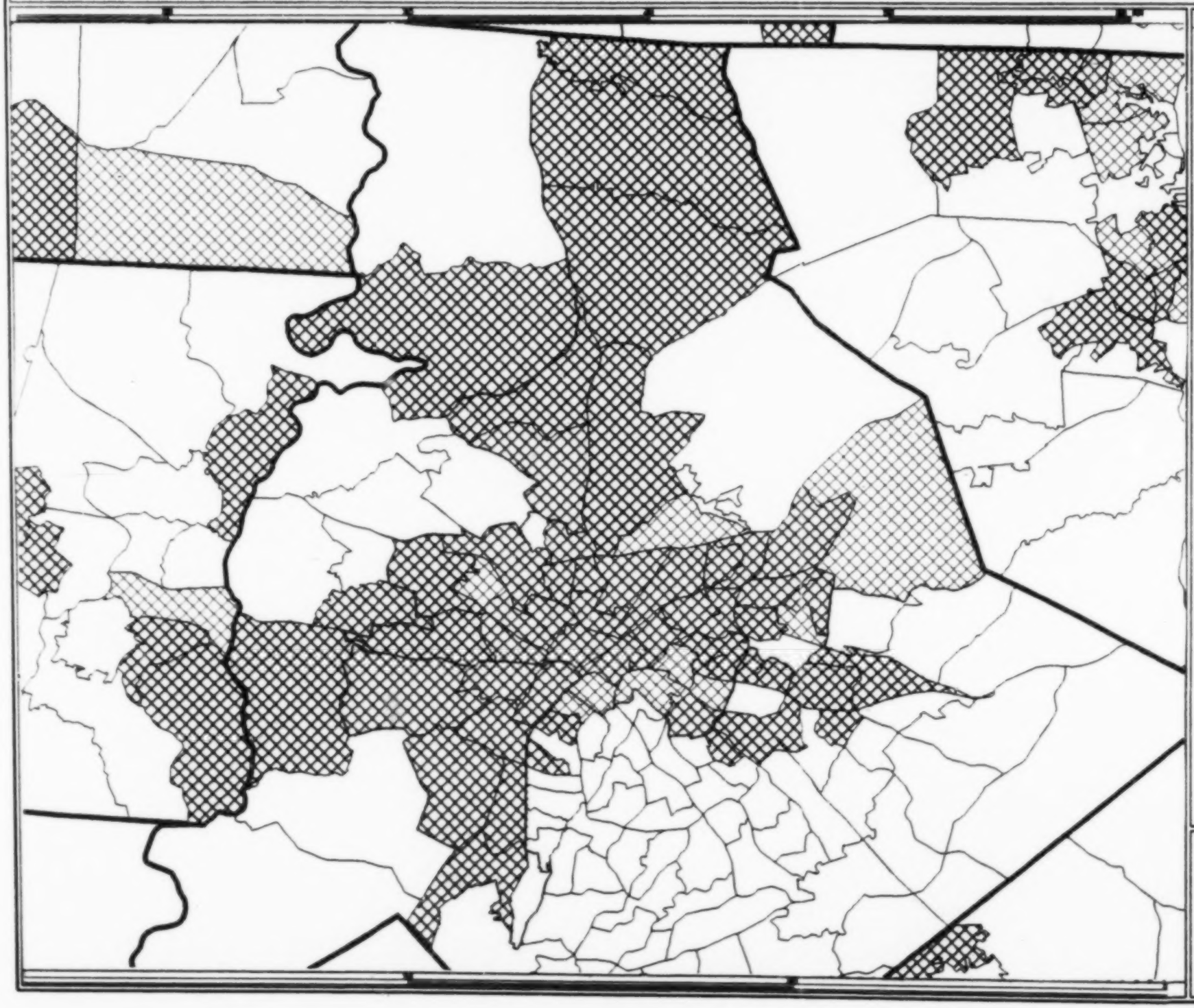


LEGEND

- County Boundary
- VTD Boundary
- *Dist. Boundary (C004)*
- 0 – 39.9% Democrat
- 40 – 49.9% Democrat
- 50 – 59.9% Democrat
- 60 – 100% Democrat

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates

1997 Congressional Plan – Mecklenburg County
Voter Precincts by Percent Democratic Vote in 1988 COA Race



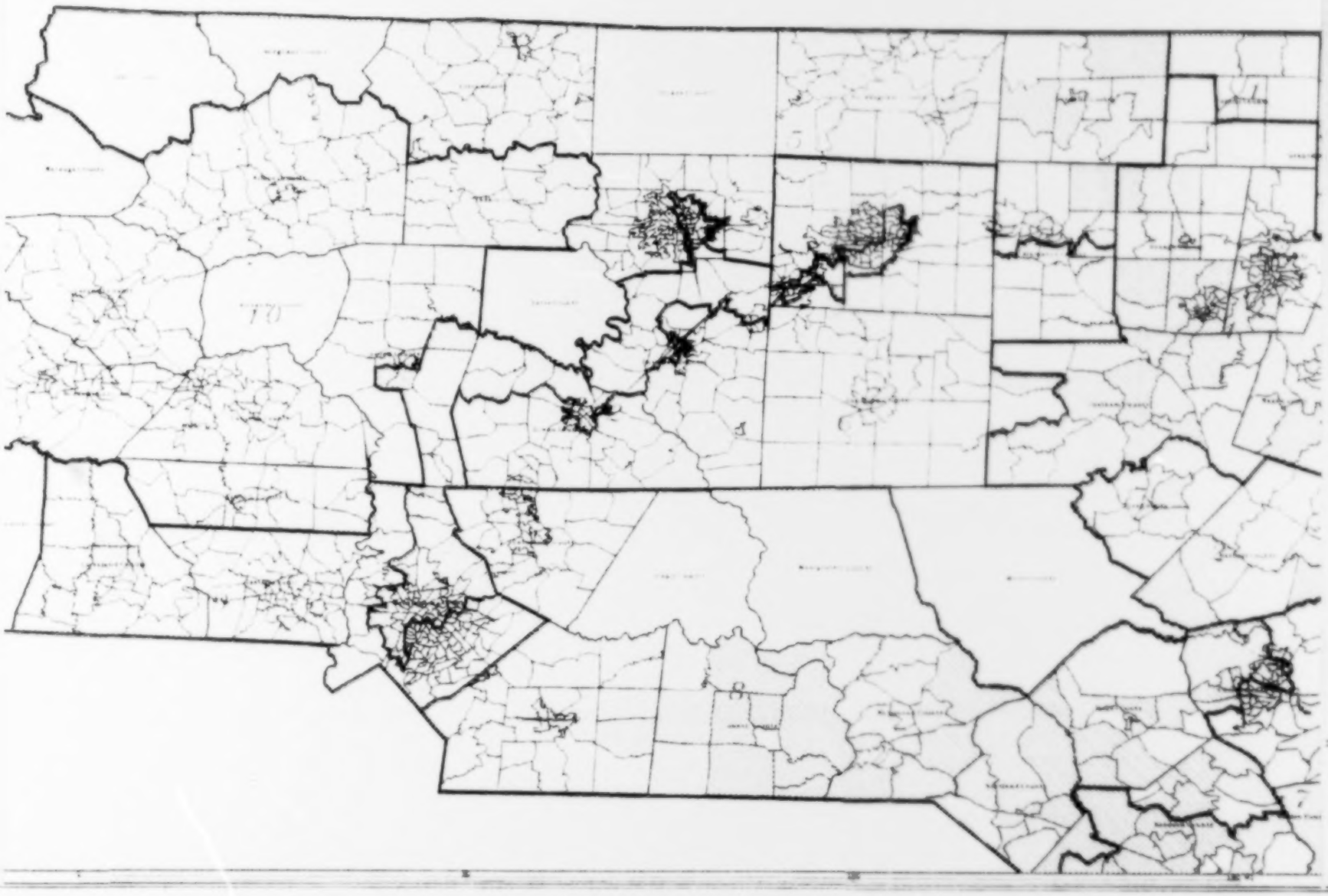
LEGEND

- County Boundary
- VTD Boundary
- *Dist. Boundary (C004)*
- 0 – 39.9% Democrat
- 40 – 49.9% Democrat
- 50 – 59.9% Democrat
- 60 – 100% Democrat

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates

1997 Congressional Plan – District 12
Region Precincts by Percent Democrat Vote
in 1990 Senate Race

September 21, 1999



LEGEND

County Boundary

Dist. Boundary (1984)

0 - 9.9% Democrat

10 - 19.9% Democrat

50 - 59.9% Democrat

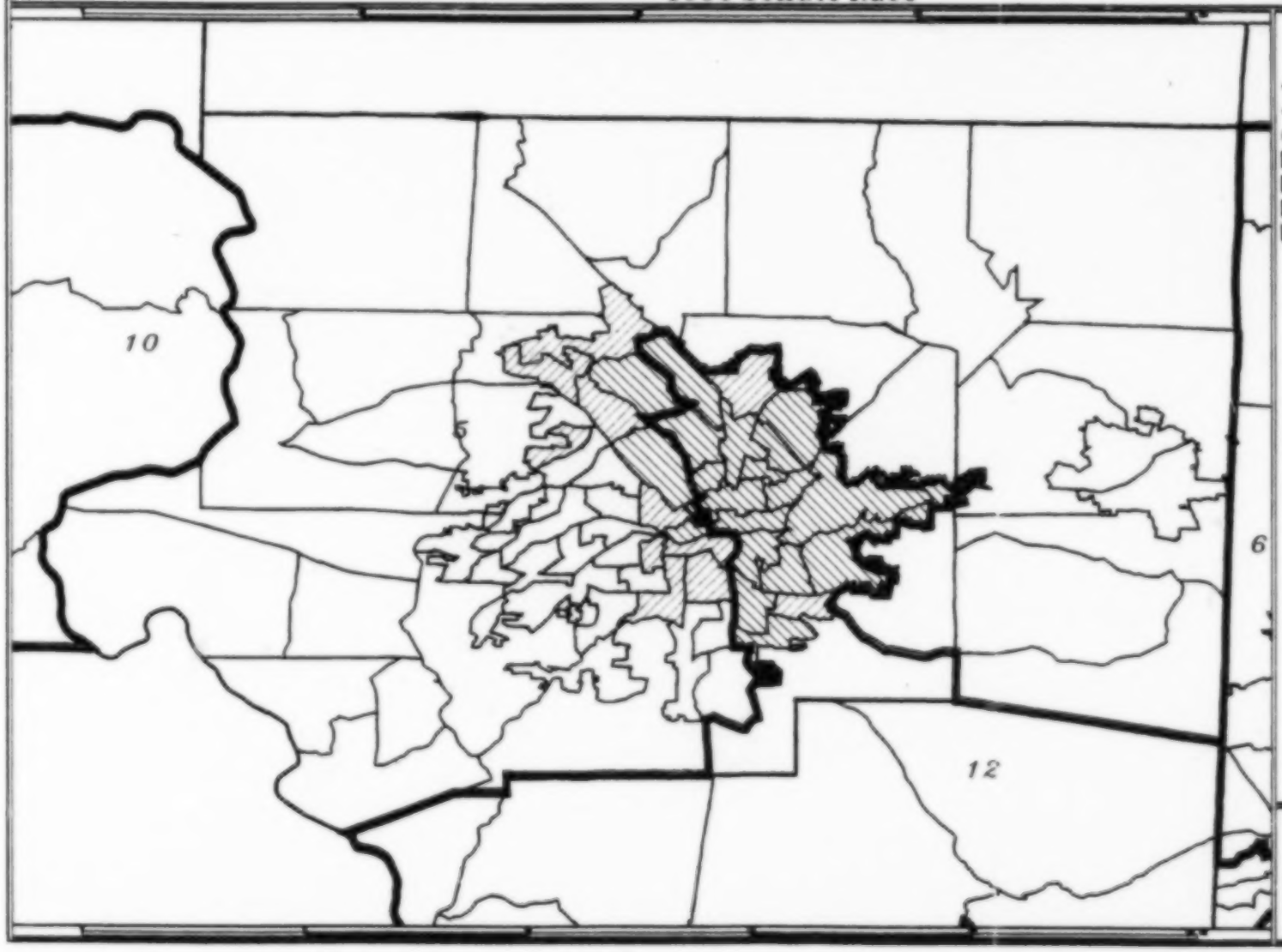
60 - 100% Democrat

19 County

N.C. General Assembly
Legislative Services Office
Redistricting System
Software Copyright 1998
Public Systems Associates

1997 Congressional Plan – Forsyth County
Voter Precincts by Percent Democrat Vote in
1990 Senate Race

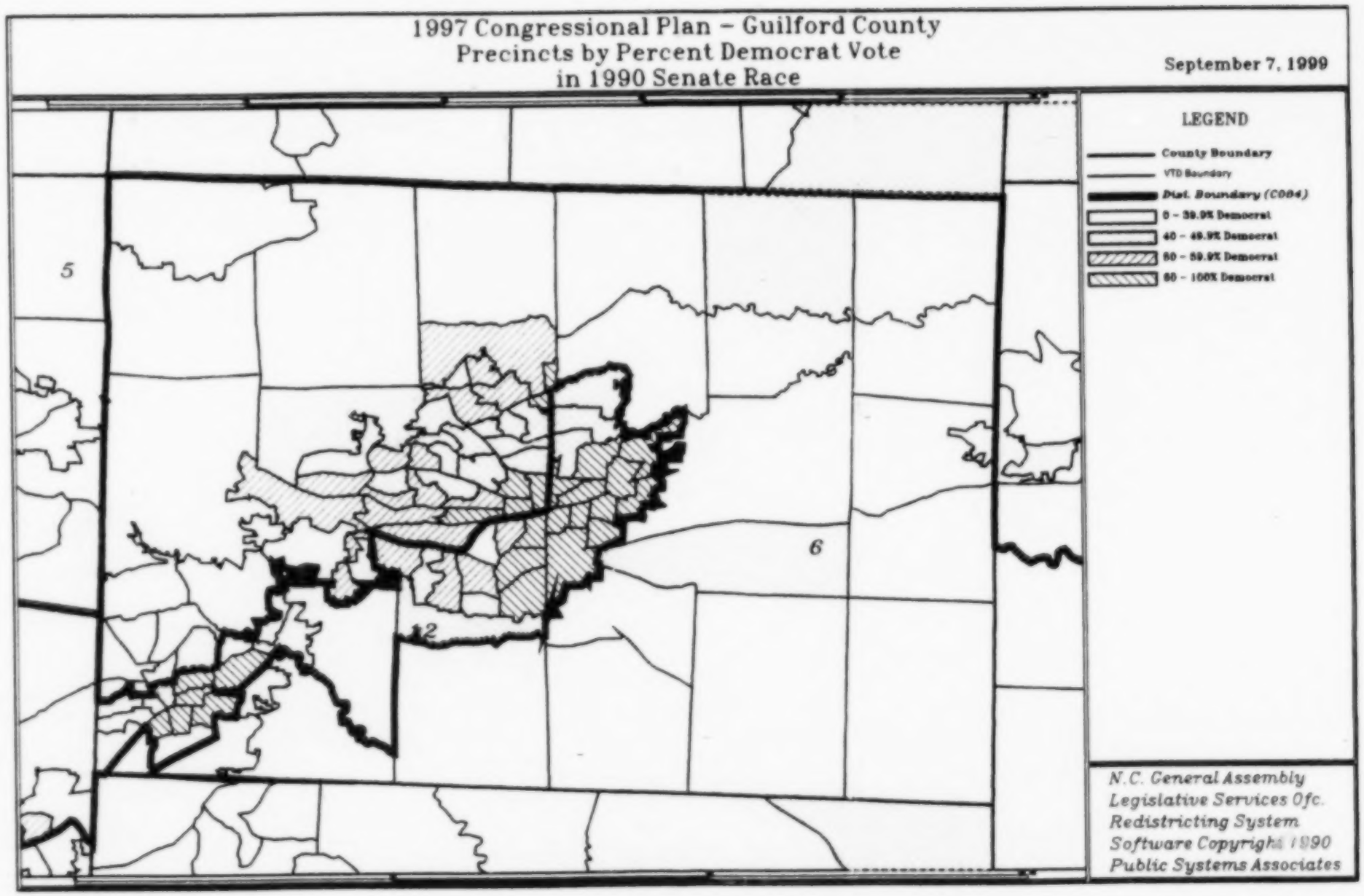
September 13, 1999



LEGEND

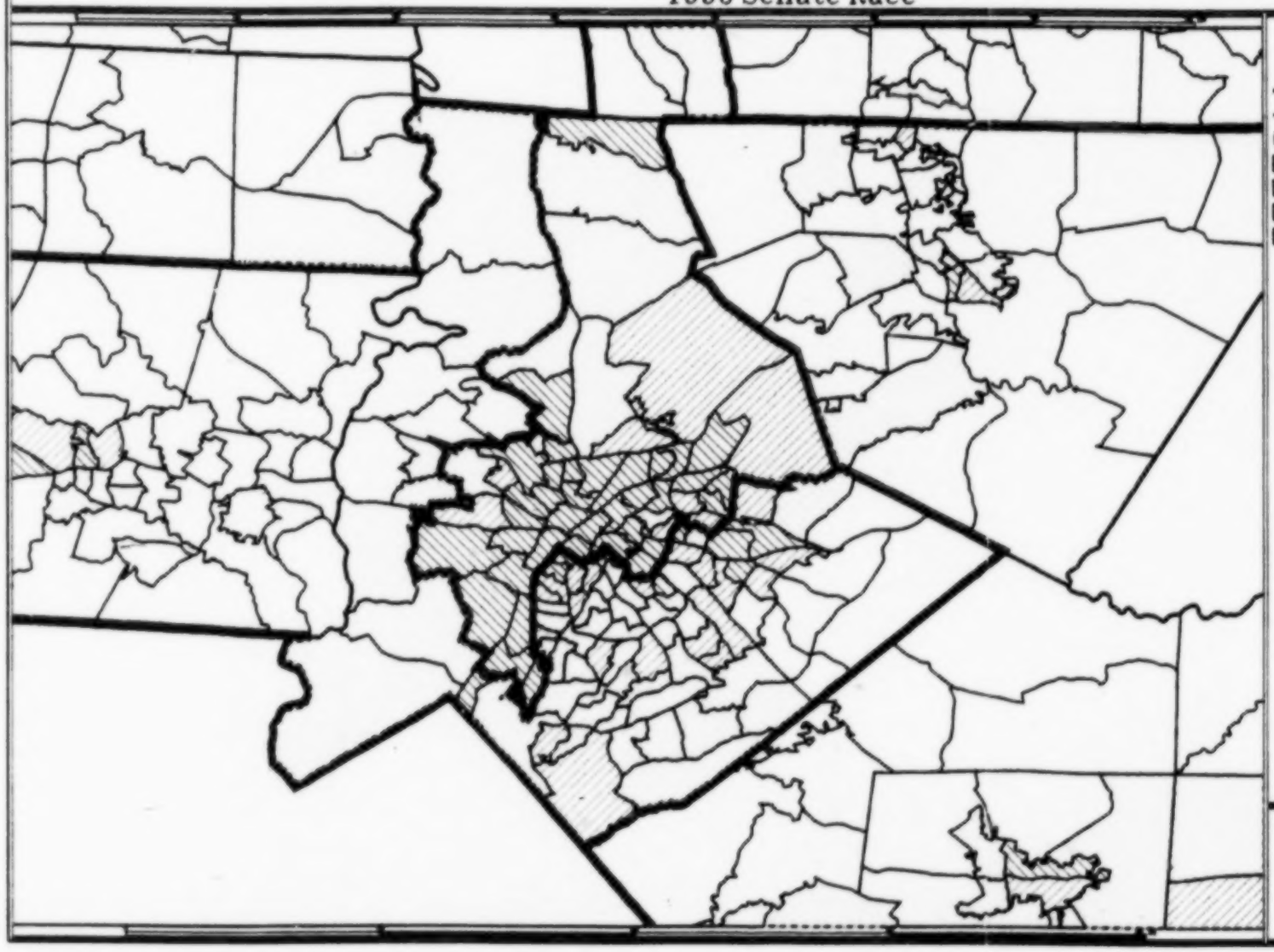
- County Boundary
- VTD Boundary
- Dist. Boundary (C004)
- 0 – 39.9% Democrat
- 40 – 49.9% Democrat
- 50 – 59.9% Democrat
- 60 – 100% Democrat

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates


1997 Congressional Plan – Guilford County
Precincts by Percent Democrat Vote
in 1990 Senate Race
September 7, 1999
LEGEND
County Boundary
VTD Boundary
Dist. Boundary (C084)
0 - 39.9% Democrat
40 - 49.9% Democrat
50 - 59.9% Democrat
60 - 100% Democrat
5
6
12
N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates

1997 Congressional Plan – Mecklenburg County
Precincts by Percent Democrat Vote in
1990 Senate Race

September 13, 1999



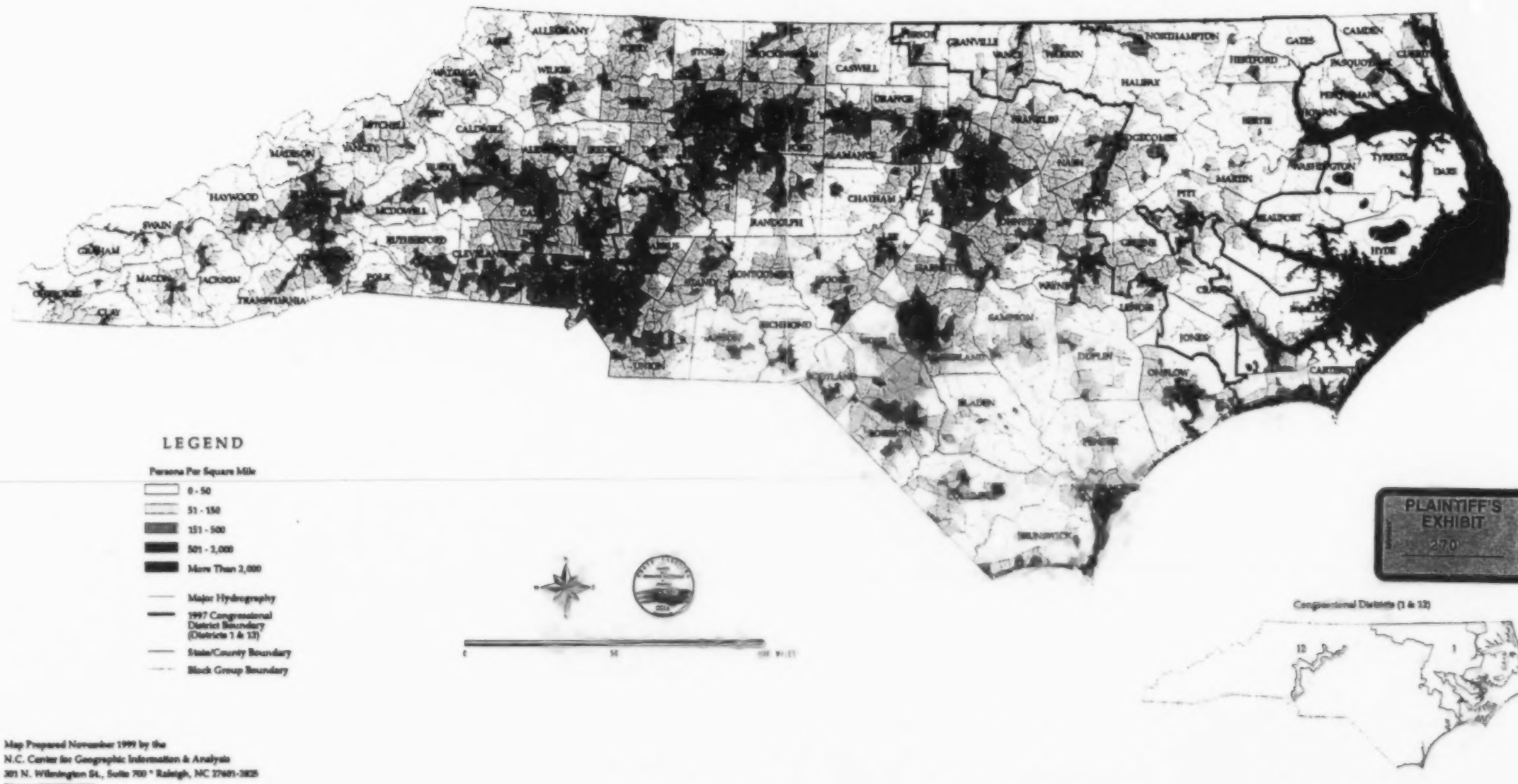
LEGEND

- County Boundary
- VTD Boundary
- Dist. Boundary (C004)
- 0 - 39.9% Democrat
- 40 - 49.9% Democrat
- 50 - 59.9% Democrat
- 60 - 100% Democrat

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
Public Systems Associates

North Carolina 1990 Population Density

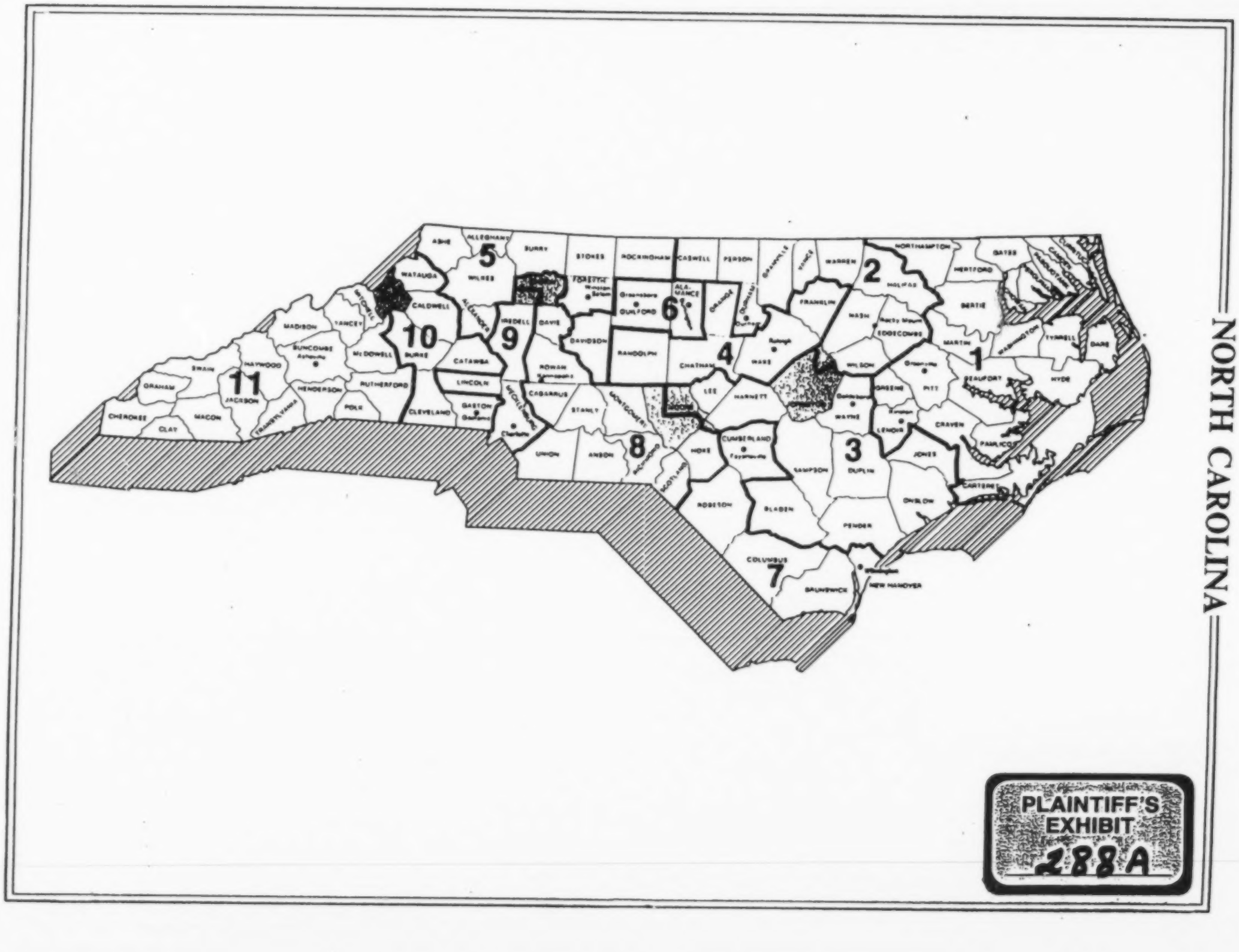
(By Block Group)



Map Prepared November 1999 by the
N.C. Center for Geographic Information & Analysis
301 N. Wilmington St., Suite 700 * Raleigh, NC 27601-2825
Phone: (919)733-2090

PLAINTIFF'S EXHIBIT 270

BEST AVAILABLE COPY



PLAINTIFF'S EXHIBIT 288A

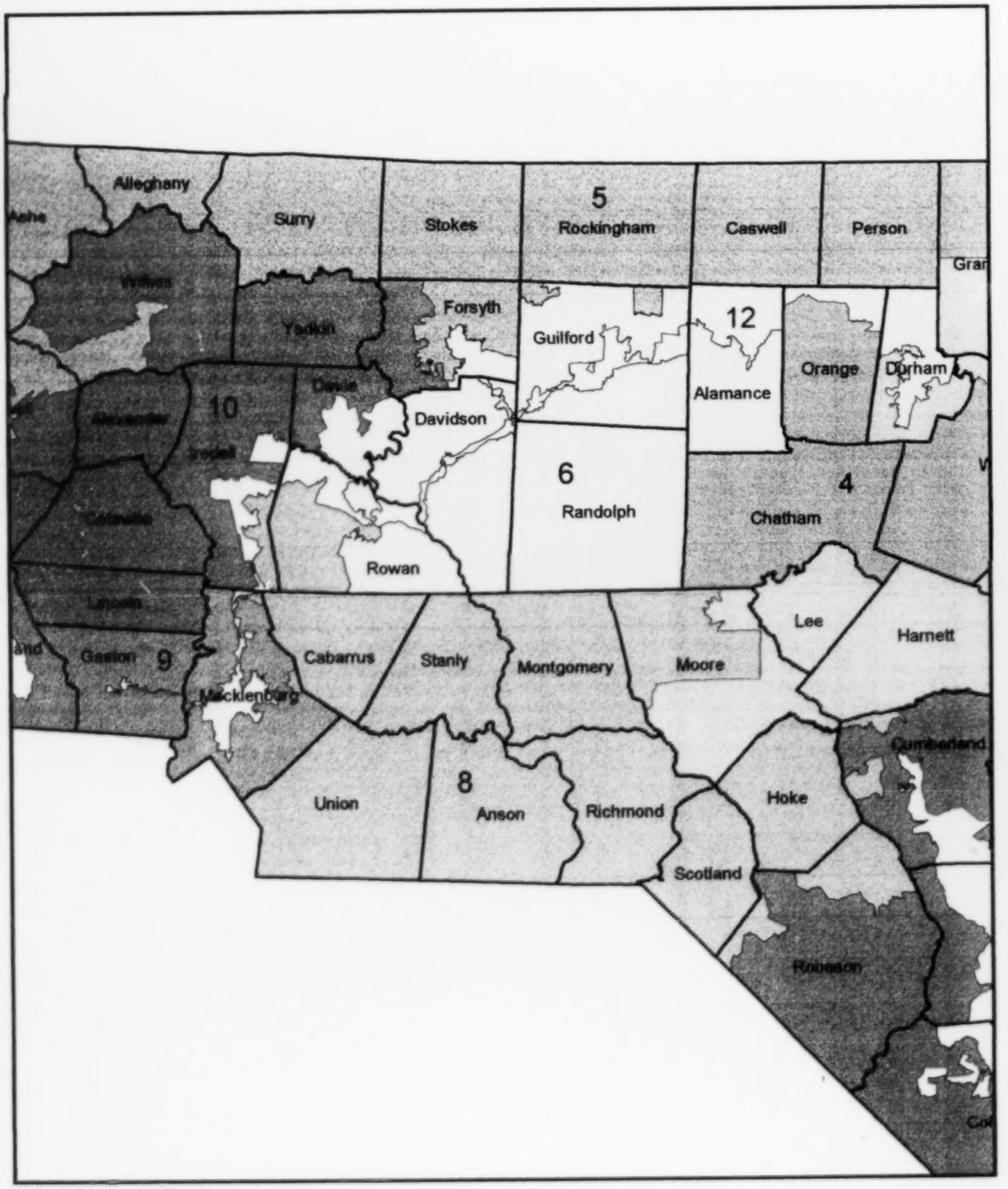
Map of Congressional Districts, Counties, and Selected Cities

(11 Districts)

U.S. DEPARTMENT OF COMMERCE
SOCIAL AND ECONOMIC STATISTICS ADMINISTRATION
BUREAU OF THE CENSUS

PLAINTIFF'S EXHIBIT 289

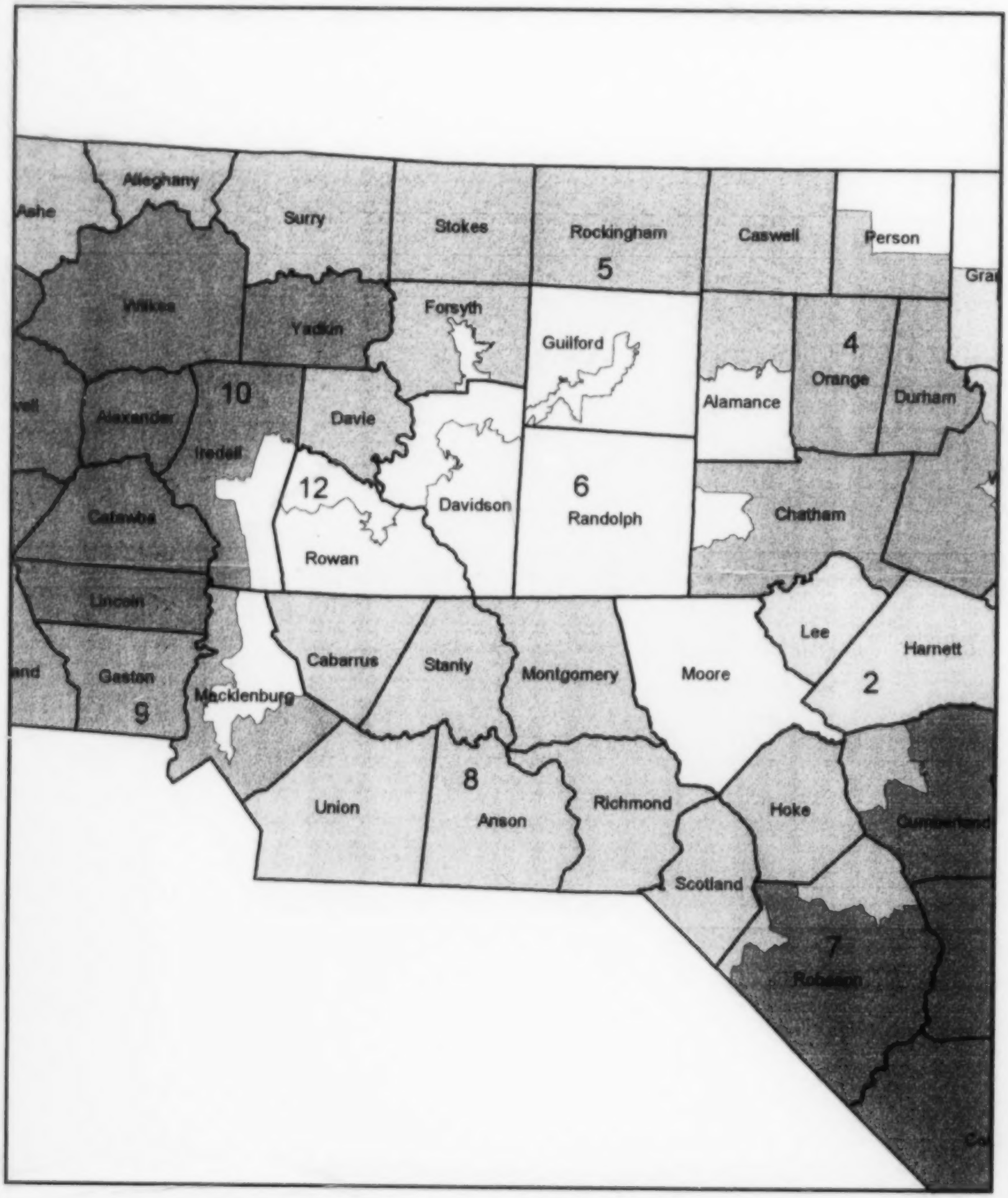
1992 Congressional Plan



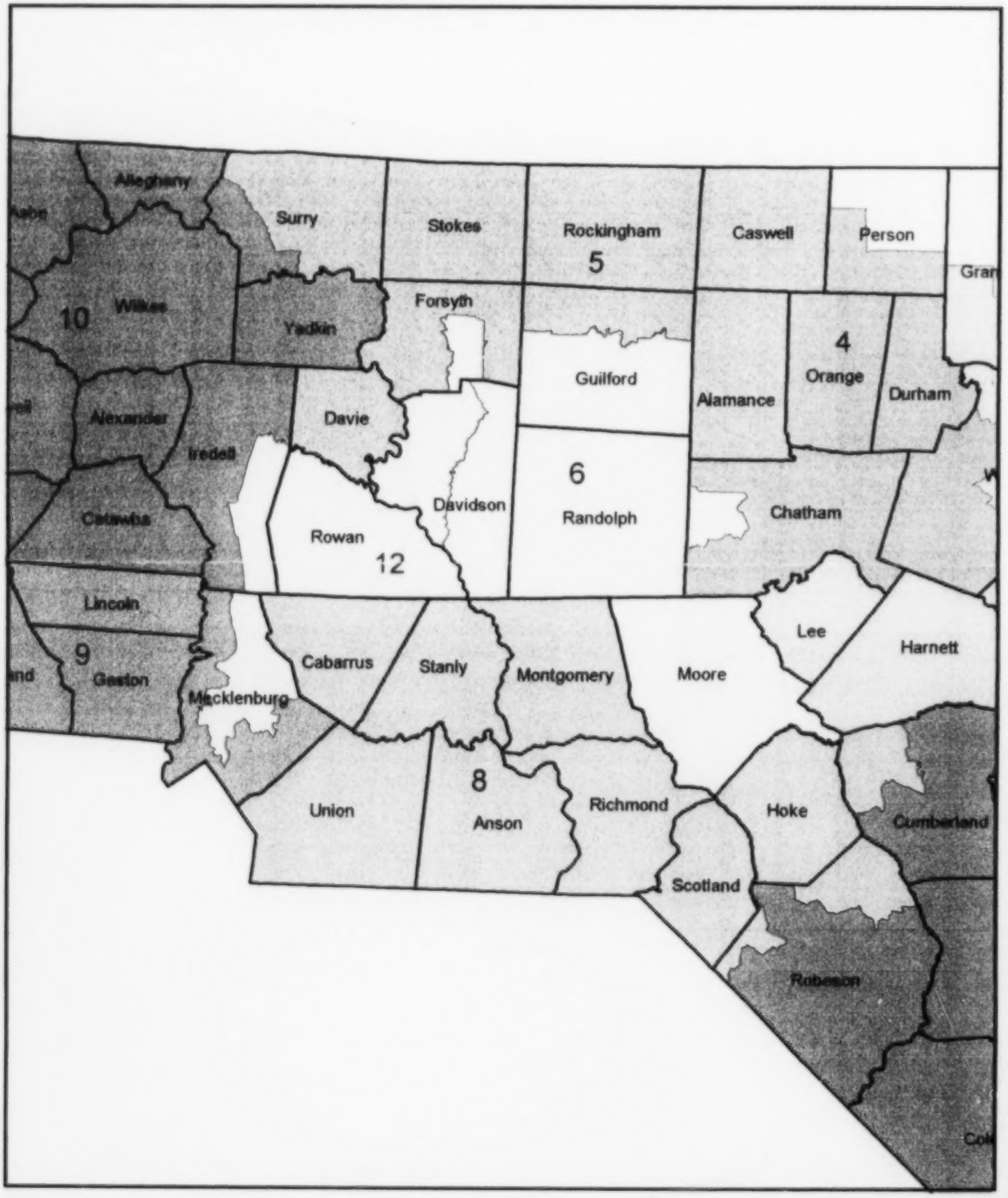
Produced by the North Carolina General Assembly, Information Systems Division, May 20, 1998

500

97 House/Senate Plan A



98 Congressional Plan A



502

EXHIBIT 306 - A CHRONOLOGY OF NORTH CAROLINA REDISTRICTING IN THE 1990S. AUGUST 1999 (EXCERPTS).

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

June 14, 1996	House Speaker Harold Brubaker (WR) appoints House Select Committee on Congressional Redistricting, headed by Rep. Robert Grady (WR).
July 3, 1996	Robinson O. Everett files *Cromartie v. Hunt* in U.S. Eastern District of N.C., using a *Shaw* theory to challenge the 1st congressional district. Action in the case is later stayed pending outcome of *Shaw*.
July 8, 1996	Senate President Pro Tem Marc Basnight (WD) appoints Senate Select Committee on Redistricting, headed by Sen. Roy Cooper (WD). Sen. Cooper writes letter to N.C. Attorney General Michael Easley saying that it is not feasible to redraw congressional districts in time for new districts to be used in 1996 congressional elections.
July 10, 1996	Senate Select Committee meets to discuss *Shaw* decision and the feasibility of enacting a remedial plan before the 1996 congressional elections.
July 12, 1996	3-judge panel allows *Shaw* plaintiffs and plaintiff-intervenors amend complaint to add new parties and challenge District 1.
July 17, 1996	House Rules Committee Chair Richard Morgan (WR) releases a congressional redistricting plan, "Congress-96-001", containing one majority black district in northeast and one majority black+Indian district in south.
July 19, 1996	3-judge panel issues order asking for opinions of Speaker, President Pro Tem, and committee leaders on whether it is feasible to adopt a remedial congressional plan for the 1996 elections. Senate says no. House says yes.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

July 24, 1996	House Rules Committee conducts a public hearing at which Rep. Morgan presents and explains "Congress-96-001".
July 30, 1996	3-judge panel issues order : • Prohibiting State from conducting any congressional elections after 1996 under existing plan. • Allowing State to conduct 1996 elections under existing plan. • Giving the General Assembly until April 1, 1997 to propose remedial plan.
September 29, 1996	Americans for Defense of Constitutional Rights, a group connected with the *Shaw* plaintiffs, announces it will award $1,000 to anyone who can draw a majority black congressional district that is ruled to be compact by expert judges. (It is later announced that $2,000 will be awarded to anyone who can draw two majority-black districts that pass the compactness test.)
November 5, 1996	Second general election held under 1990s redistricting plans. Following results occur in minority districts: CD1 -- Eva Clayton (BD) CD12 – Melvin Watt (BD) In addition, these black legislators are elected in multi-member, majority-white districts: Mickey Michaux (BD) in HD23, Jeanne Lucas (BD) in SD13, and Howard Lee (BD) in SD16. Total of 25 minority legislators is same as the 25 elected in 1994. Total of 2 minority Congress members is the same as 1994. Republicans and Democrats divide the U.S. House delegation evenly, 6 and 6. Shift of 2 seats from Republican to Democratic.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

December 17, 1996	Study Committee on Election Laws Reform recommends that 1997 General Assembly propose a constitutional amendment to give redistricting decisions to an Independent Redistricting Commission. This would apply to congressional and legislative redistricting beginning in 2001. The Study Committee will report January 3, 1997, to the Legislative Research Commission. The LRC will vote to transmit the request to the 1997 General Assembly. The proponent of the Independent Redistricting Commission, Rep. John Weatherly (WR), will introduce the Study Committee's recommendation February 5 as House Bill 52.
January 23, 1997	Magistrate judge gives plaintiff in *Daly v. High* until February 14 to report why the suit has not been served on the defendant.
January 29, 1997	1997 General Assembly convenes. With House Republican majority of 61-59, Speaker Harold Brubaker re-elected. With Senate Democratic majority of 30-20, President Pro Tem Marc Basnight re-elected. Speaker Brubaker appoints new House Committee on Congressional Redistricting, chaired by Rep. Ed McMahan (WR). President Pro Tem Basnight reauthorizes the Senate Select Committee on Redistricting, still chaired by Sen. Cooper.
February 5, 1997	Rep. Weatherly introduces HB 52, calling for a constitutional amendment to give an Independent Redistricting Commission, rather than the General Assembly, the authority to redistrict State House, State Senate, and Congress. The amendment would go into effect for the 2001 redistricting. The bill, similar to one Rep. Weatherly had introduced in 1995, was recommended by the Legislative Research Commission's Study Committee on Election Law Reform.
February 10, 1997	Deadline for submission of plans in the contest for compact minority districts conducted by Americans for Defense of Constitutional Rights.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

February 12, 1997	House CR Committee holds first meeting, hears from Edwin Speas, Senior Deputy State AG, on the *Shaw* litigation.
February 13, 1997	Rep. Mickey Michaux (BD) removed from House Redistricting Committee by Speaker. Replaced by Rep. Toby Fitch (BD). Speaker Brubaker says change was made to correct an oversight: He had originally intended to appoint Rep. Fitch.
February 20, 1997	Senate Select Committee meets. Sen Cooper presents "1997 Congressional Plan A," containing 2 minority districts. He says no vote will be taken on the plan, but that a public hearing will be held the next week.
February 24, 1997	Six N.C. Democratic Congress Members meet in Legislative Building with Sen. Cooper. They express mixed feelings about the Senate proposal. Robinson Everett announces there are no winners for the prize of $2,000 for drawing two compact majority-black congressional districts. But he awards $1,000 to Jack W. Daly for drawing the most compact majority-black single congressional district. Daly's plan, "Everett's Bane 3", split three counties and stretched from Durham to Pasquotank counties. *Daly says he will use the money to further his lawsuit.* John Sanders, retired director of the Institute of Government, is judge of the contest.
February 25, 1997	Rep. Weatherly introduces House Joint Resolution 322, providing for an independent commission to draw a congressional redistricting plan to satisfy the court order in *Shaw*. House CR Committee meets. Rep. McMahan presents "1997 House Congressional Plan A.1", similar in many ways to the Senate proposal. Rep. McMahan says no vote will be taken, but the plan will receive input at a public hearing.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

February 26, 1997	Joint House-Senate public hearing held in Legislative Building. Everett calls House and Senate proposals "fruit of the poisonous tree." Sen. Betsy Cochrane says Senate Republicans will present a plan that will have a minority district from Charlotte to the Sandhills. Rep. Weatherly promotes his idea of an independent commission. Several speakers address local matters.
February 27-March 18, 1997	Sen. Cooper and Rep. McMahan negotiate over differences between their two plans. Chief issue is how Wake County would be divided between Districts 2 and 4.
March 17, 1997	Irving Joyner, representing N.C. Association of Black Lawyers, sends letter to Sen. Cooper criticizing both House and Senate proposals.
March 19, 1997	Sen. Cooper introduces SB 433, embodying "1997 Congressional Plan A". Senate Select Committee meets, and Sen. Cooper presents SB 433 for a vote. Sen. Cochrane presents "Congress Cochrane" as an amendment; that amendment is defeated. Committee gives a favorable report to SB 433 as introduced. House CR Committee meets. Rep. McMahan presents "97 House Congress Plan G" for a vote. Under House rules, a favorable vote by a committee constitutes authorization for the committee to introduce the bill.
March 24, 1997	Rep. Grady introduces HB 585. Rep. McMahan introduces HB 586, embodying "97 House Congress Plan G", on behalf of his committee. The Speaker refers that bill back to the House CR Committee. Rep. McMahan and Sen. Cooper negotiate the differences between their committees' two plans and agree to "97 HOUSE/SENATE PLAN".

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

March 25, 1997	House CR Committee meets. Rep. McMahan presents the compromise, "97 HOUSE/SENATE PLAN", as a committee substitute for HB 586. Two amendments are defeated: • One from Rep. Dan Blue to change Dist. 4 so that Wake County would be predominately in Dist. 4. ("1997 CONGRESSIONAL PLAN D1") • One from Rep. Ronnie Sutton to a majority Native American precincts of Robeson County in Dist. 7. The Committee Substitute for HB 586 is given a favorable report without committee amendment. Rep. Steve Wood (WR) introduces HB 599, ("Shaw Compliance Plan C").
March 26, 1997	HB 586 goes to House floor. Rep. McMahan presents an overview, saying that the plan is designed so that all incumbents, black and white, Democratic and Republican, have a fair chance at re-election. Four amendments are offered: • One from Rep. Sutton, similar to one he offered in committee. It passes. • Three amendments from Rep. Mickey Michaux, embodying "Fitch Michaux Plan A", "Fitch/Michaux Plan B", and "Fitch/Michaux Plan C". All have one majority-black district and three districts with minority populations between 30% and 40%. They are defeated. House passes the bill on second reading 87-30. Bill passes third reading and is sent to Senate.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

March 27, 1997	Senate Select Committee on Redistricting takes up House-passed HB 586. No amendments are offered. Committee gives bill a favorable report. HB 586 goes to Senate floor. Sen. Cooper gives an explanation, says that while the bill is not designed to protect incumbents that it gave all incumbents a fair chance at re-election. He said the authors took note of the 6-6 partisan split in the congressional delegation and felt that they should not use court-ordered redistricting to overturn that decision of the people. One amendment is offered by Sen. Cochrane, embodying "Congress Cochrane". It is defeated. Senate passes bill on second reading 32-14.
March 31, 1997	HB 586 ratified as Chapter 11 of the 1997 Session Laws.
April 1, 1997	AG Easley files the ratified plan with the 3-judge panel. He also moves requesting that the court delay ruling on the plan until the U.S. Justice Department has precleared or denied preclearance pursuant to Section 5 of the Voting Rights Act.
April 9, 1997	Chapter 11 of 1997 Session Laws submitted to U.S. Justice Department under Section 5 of Voting Rights Act. Rep. Michaux introduces HB 901 (with Reps. Fitch and Adams).
April 23, 1997	House Congressional Redistricting Committee meets to consider HB 52 (Independent Redistricting Commission). After discussion, Committee votes to send bill to a subcommittee.
May 6, 1997	3-judge panel denies fees to Maupin, Taylor, Ellis, and Adams, attorneys for plaintiff intervenors in *Shaw*.
May 16, 1997	Reps. Michaux and Fitch meet with U.S. Justice officials in Washington to advocate for their congressional plan (embodied in March 26 House floor amendment) as alternative to enacted plan. (Date is 16th or earlier same week.)

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

May 28, 1997	3-judge panel denies motion to intervene in *Shaw* suit by several black voters and associations. They sought to assert dilution claims and offer alternative plans.
June 9, 1997	U.S. Justice Department preclears Chapter 11. 3-judge panel directs *Shaw* plaintiffs and plaintiff-intervenors to tell court by July 19 whether they will object to dismissal of the suit and if so on what basis.
June 19, 1997	*Shaw* plaintiffs and plaintiff-intervenors respond that they wish the lawsuit to be dismissed without prejudice against the filing of a new one. Robinson Everett, plaintiffs' attorney, urges the court to declare the new plan unconstitutional, but states that his plaintiffs no longer have standing to challenge the new 12th or 1st districts, because they do not live in them. U.S. Supreme Court upholds court-ordered districting plan in Georgia.
July 3, 1997	State argues to court that plaintiffs and plaintiff-intervenors do live in the districts, do have standing to continue the lawsuit, and are seeking dismissal simply so they can file a new lawsuit and shop for a more favorable 3-judge panel.
August 28, 1997	1997 General Assembly adjourns until May 11, 1998.
September 12, 1997	3-judge panel dismisses the *Shaw* suit. In opinion accompanying its order, the court says the dismissal is only on the issue of the remedial adequacy of the violation of Equal Protection that the plaintiffs succeeded in showing against the former Dist. 12.
October 10, 1997	Robinson Everett, attorney for *Shaw* plaintiffs, lodges an amended complaint in *Cromartie v. Hunt*. The complaint uses a *Shaw* theory to challenge the March 31 congressional redistricting plan as "fruit of the poisonous tree" planted in 1992. Plaintiffs reside in the new 1st and 12th districts.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

January 15, 1998	*Cromartie v. Hunt* moved to jurisdiction of the same 3-judge panel as *Daly*: Ervin, Voorhees, and Boyle.
March 31, 1998	3-judge panel holds hearing in Morganton on *Cromartie* cross motions for summary judgment and plaintiffs' motion for preliminary injunction.
April 3, 1998	3 -judge panel grants summary judgment and preliminary injunction in Cromartie for 12th district only. Gives State until April 8 to report how long it will take to redraw the plan and to propose a special primary schedule that would allow the general election in the new congressional districts to occur on November 3.
April 8, 1998	State tells 3-judge panel in *Cromartie* it needs more time to answer its questions.
April 9, 1998	3-judge panel in *Cromartie* extends State's deadline for responding to order.
April 13, 1998	U.S. Supreme Court denies stay of 3-judge panel's order enjoining 1998 congressional elections and requiring redrawing of plan. Decision is 6-3, with Breyer, Ginsburg, and Stevens dissenting.
April 14, 1998	3-judge panel issues Memorandum Opinion in *Cromartie*. Says the new 12th district shows race as a predominant factor and is uncompact. Says those issues are clear enough to grant summary judgment for 12th, but not so clear in case of the new 1st. district. Judge Ervin dissents.
April 17, 1998	State submits proposed schedule to 3-judge panel, including May 29 deadline for General Assembly to enact corrective plan and September 15 special congressional primaries with no runoff. State also moves that court allow May 5 primaries to proceed in congressional districts unaffected by redrawing District 12.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

April 21, 1998	3-judge panel orders schedule for redrawing and for special congressional primaries: • May 22 deadline for legislature to redraw. • June 24 for Voting Rights Act preclearance of redrawn plan. If no preclearance by then, Court will assume sole responsibility. • July 1 deadline for Court if Court must draw the plan. • July 6-20 special congressional candidate filing period. • September 15 special congressional primaries.
April 21, 1998	3-judge panel rejects State's motion to allow May 5 primary in "unaffected" congressional districts.
May 11, 1998	Regular 1998 Short Session of 1997 General Assembly convenes.
May 13, 1998	House and Senate Committees hold joint public hearing on congressional redistricting: • Robinson Everett urges legislators to redraw by creating a whole new plan, not simply by "tweaking" the 12th and leaving the 1st alone. He says Mecklenburg should not be split, and no district should run from Charlotte to Forsyth or Guilford. • Reps. Wayne Goodwin, Larry Womble, and Linwood Mercer and Sen. Betsy Cochrane present plans of their own.
May 18, 1998	House and Senate leaders agree upon "98 CONGRESSIONAL PLAN A." It changes only Districts 5, 6, 9, 10, and 12 from the 1997 plan. District 12 is removed from Guilford County and fills all of Rowan County. It goes from 46.67% black to 35.58% black.
May 19, 1998	Agreed-upon plan introduced by Sen. Cooper as SB 1185. Agreed-upon plan approved by House Congressional Redistricting Committee, which under House Rules can introduce it as a bill.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

May 20, 1998	House Congressional Redistricting Committee introduces its approved plan as HB 1394. Full House takes up HB 1394. Adopts an amendment providing that plan will be effective for 1998 and 2000 elections unless U.S. Supreme Court reverses the decision invalidating the prior plan. House then passes bill 90-27 on 2nd reading. House rejects effort by Rep. Linwood Mercer to delay final vote, saying he wanted time to prepare an amendment revising the 1st district. Bill passes 3rd reading. Senate Select Redistricting Committee approves SB 1185, after adopting the same amendment adopted on House floor.
May 21, 1998	Full Senate takes up HB 1394 instead of its own identical SB 1185, passes it on 2nd and 3rd readings 30-17. HB 1394 ratified as Session Law 1998-2.
May 22, 1998	Session Law 1998-2 submitted to both 3-judge panel and to U.S. Department of Justice under the Voting Rights Act.
May 27, 1998	Everett files objection to Session Law 1998-2
June 8, 1998	U. S. Department of Justice preclears Session Law 1998-2.
June 22, 1998	3-judge panel gives its approval to Session Law 1998-2 for 1998 election.
July 20, 1998	Special congressional candidate-filing period ends. Six candidates file for Republican nomination for 12th District.
July 22, 1998	State moves to consolidate *Cromartie* and *Daly* cases.

THIS EXHIBIT WAS ADMITTED FOR TIMES AND DATES ONLY

September	Special Congressional Primaries held, using 1998 Congressional Plan. Rep. Eva Clayton (B) wins Democratic nomination by 63.9% in District 1 over well-known white opponent, Linwood Mercer. Rep. Mel Watt (B) wins Democratic nomination in District 12 by 84.3% over less-well-known opponent. Republicans in 12th nominate Scott Keadle with 28% of the vote. Second primary was eliminated in special election schedule.
November 3, 1998	Incumbent black Democrats easily defeat Republican opponents in Districts 1 and 12, even though majority percentage significantly reduced. Eva Clayton (1st) – 62.2%. Mel Watt (12th) -- 55.9%.
January 20, 1999	U.S. Supreme Court hears oral arguments in *Hunt v. Cromartie*.
May 17, 1999	U.S. Supreme Court reverses 3-judge panel in Cromartie. Vote is 9-0. Justice Clarence Thomas writes for majority that summary judgment is inappropriate in a redistricting case where circumstantial evidence could give rise to conclusion that predominate reason for drawing district was political gerrymandering rather than racial gerrymandering. Because of language in the bill that enacted the 1998 plan, the Supreme Court's reversal reinstates the 1997 plan for the 2000 elections.

EXHIBIT 309

PROPORTION OF PRECINCTS IN SIX COUNTIES* THAT ARE IN CONGRESSIONAL DISTRICT 12, 1997 PLAN

	Precincts in CD 12	Precincts not in CD 12	% CD 12
All Precincts	154	275	35.90
More than 40% Black Population	76	3	96.20
More than 40% Democratic, as Measured by			
1990 U.S. Senate Election	124	146	45.93
1988 Court of Appeals Election	129	99	56.58
1988 Lieutenant Governor Election	137	145	48.58
Voter Registration	150	234	39.06

* Figures calculated from Defendants' Exhibit # 435

[This page intentionally left blank.]

Icon Box

Districts

Plan Builder v5.0

Function

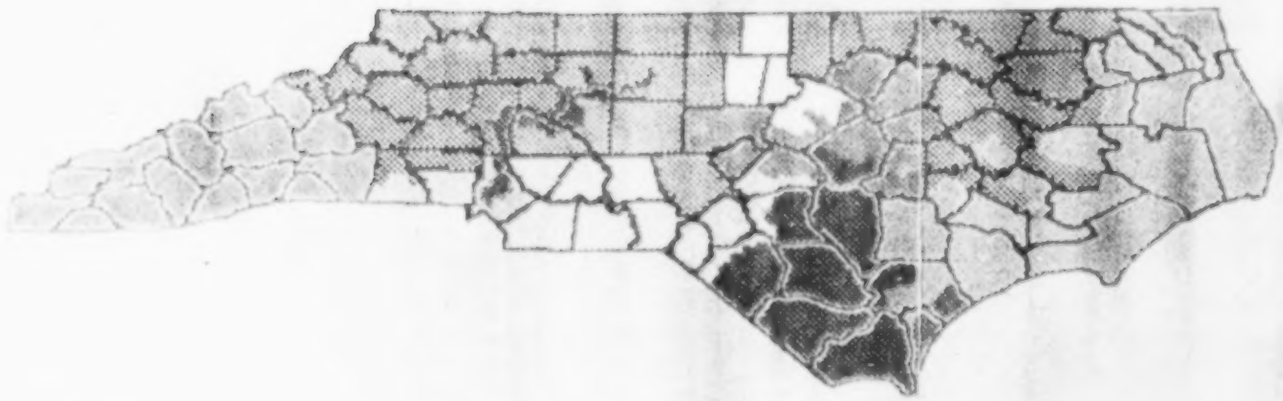
1997 CONGRESSIONAL PLAN A DEMO

State (37)

STATE

Please choose function

Map Long [W -] 85.2531 - 74.7469, Lat. [S -N]: 32.0388 - 38.4612 (592.0090 x 443.1448 mi.)



Current District

District 3

Ideal population: 552,386
Variance: 382 (0.07%)
Total Pop.:
White Pop.: 41
Black Pop.: 12
Am. Indian Pop.:
Asian Pop.:
Other Population:
Hispanic Pop.: 1
Total Voting Age Pop.: 41
White Voting Age Pop.: 32
Black Voting Age Pop: 8
Am. Indian Voting Age Pop.:
Asian Voting Age Pop.:
Other Voting Age Pop.:
Hispanic Voting Age Pop.:

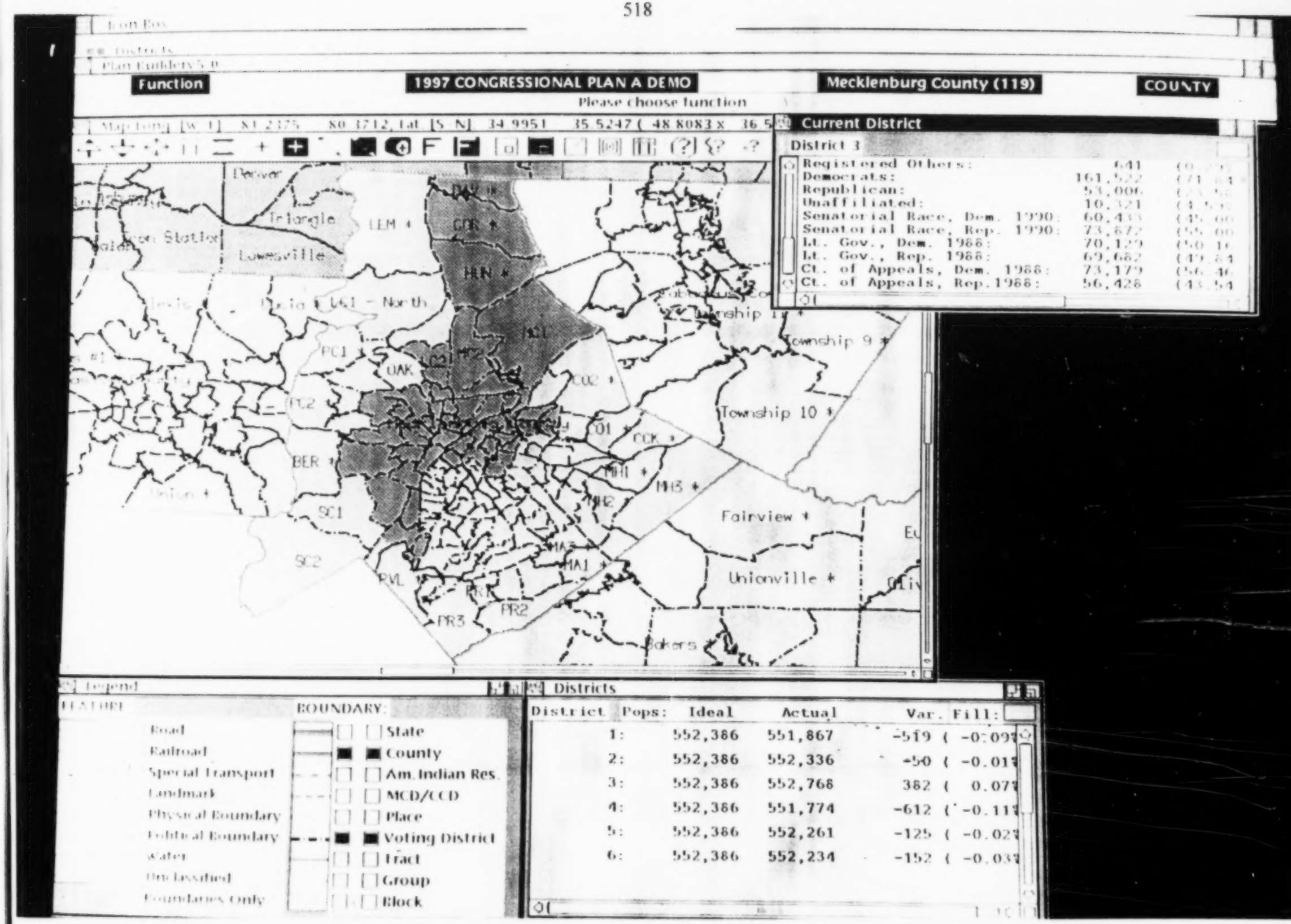
Legend

FEATURE	BOUNDARY:
Road	State
Railroad	County
Special Transport	Am. Indian Res.
Landmark	MCD/CCD
Physical Boundary	Place
Political Boundary	Voting District
Water	Tract
Unclassified	Group
Boundaries Only	Block

Districts

District	Pops:	Ideal	Actual	Var.	Fill:
1:		552,386	551,867	-519	(-0.09%
2:		552,386	552,336	-50	(-0.01%
3:		552,386	552,768	382	(0.07%
4:		552,386	551,774	-612	(-0.11%
5:		552,386	552,261	-125	(-0.02%
6:		552,386	552,234	-152	(-0.03%

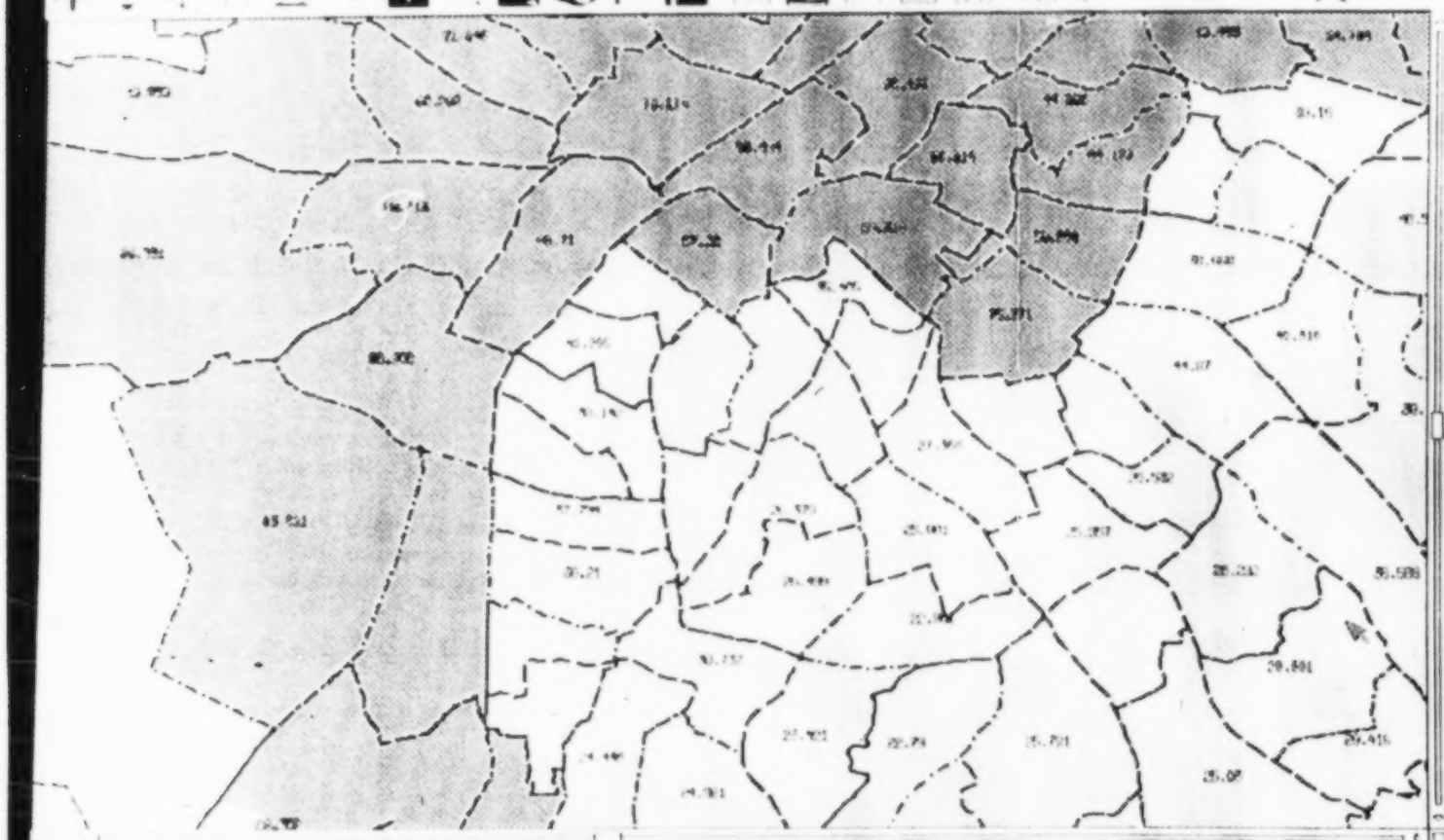
BEST AVAILABLE COPY


Function
1997 CONGRESSIONAL PLAN A DEMO
Mecklenburg County (119)
COUNTY
Please choose function
Current District
District 3
Registered Others: 641
Democrats: 161,522
Republican: 53,006
Unaffiliated: 10,321
Senatorial Race, Dem. 1990: 60,433
Senatorial Race, Rep. 1990: 73,872
Lt. Gov., Dem. 1988: 70,129
Lt. Gov., Rep. 1988: 69,682
Ct. of Appeals, Dem. 1988: 73,179
Ct. of Appeals, Rep.1988: 56,428
Denver
Triangle
Lowesville
LEM
GDR
HUN
LC1 - North
PC1
OAK
PC2
BER
SC1
SC2
PVL
PR1
PR2
PR3
MA1
MA2
MA3
MH1
MH2
MH3
CO1
CO2
CCK
Township 9
Township 10
Fairview
Unionville
Bakers
Legend
FEATURE
BOUNDARY:
Road
Railroad
Special Transport
Landmark
Physical Boundary
Political Boundary
Water
Unclassified
Boundaries Only
State
County
Am. Indian Res.
MCD/CCD
Place
Voting District
Tract
Group
Block
Districts
District Pops: Ideal Actual Var. Fill:
1: 552,386 551,867 -519 (-0.09%
2: 552,386 552,336 -50 (-0.01%
3: 552,386 552,768 382 (0.07%
4: 552,386 551,774 -612 (-0.11%
5: 552,386 552,261 -125 (-0.02%
6: 552,386 552,234 -152 (-0.03%

Function | 1997 CONGRESSIONAL PLAN A DEMO | Mecklenburg County (119) | COUNTY

Please choose function

80.9429 80.7398 Lat [S N] 35.1223 35.2465 (11.4539 x 8.5668 mi)



rs:		641	(0
		161,522	(71
		53,000	(23
		10,321	(4
, Dem. 1990:		60,133	(35
, Rep. 1990:		73,672	(55
1988:		70,129	(50
1988:		69,682	(49
Dem. 1988:		73,179	(56
Rep. 1988:		56,428	(43

BOUNDARY

- State
- County
- Am Indian Res.
- MCD/CCD
- Place
- Voting District
- Tract
- Group
- Block

Districts

District	Pops:	Ideal	Actual	Var.	Fill:
1:		552,386	551,867	-519	(-0.09
2:		552,386	552,336	-50	(-0.01
3:		552,386	552,768	382	(0.07
4:		552,386	551,774	-612	(-0.11
5:		552,386	552,261	-125	(-0.02
6:		552,386	552,234	-152	(-0.03

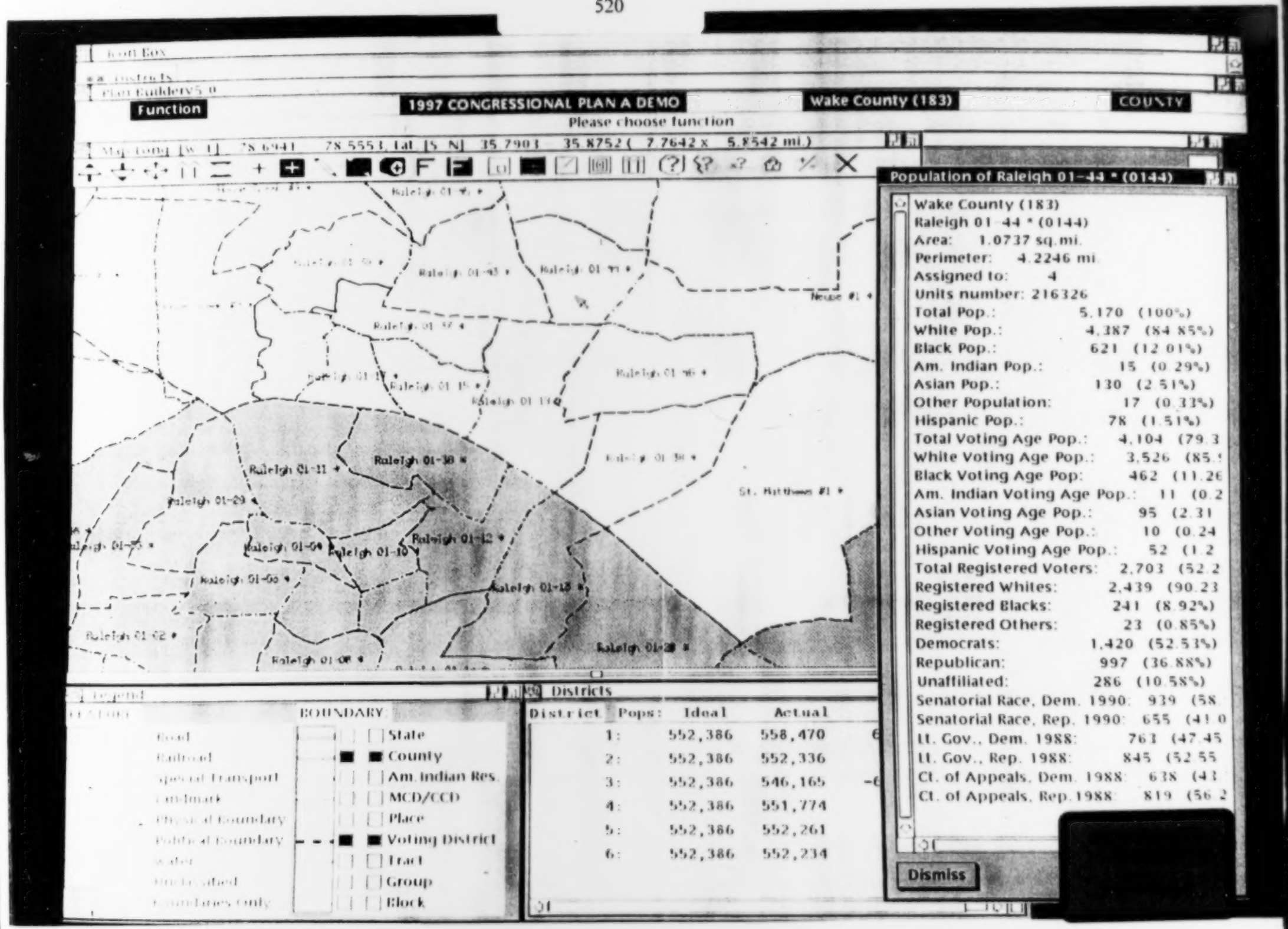

Function
1997 CONGRESSIONAL PLAN A DEMO
Wake County (183)
COUNTY
Please choose function
Population of Raleigh 01-44 * (0144)
Wake County (183)
Raleigh 01-44 * (0144)
Area: 1.0737 sq.mi.
Perimeter: 4.2246 mi.
Assigned to: 4
Units number: 216326
Total Pop.: 5,170 (100%)
White Pop.: 4,387 (84.85%)
Black Pop.: 621 (12.01%)
Am. Indian Pop.: 15 (0.29%)
Asian Pop.: 130 (2.51%)
Other Population: 17 (0.33%)
Hispanic Pop.: 78 (1.51%)
Total Voting Age Pop.: 4,104 (79.3
White Voting Age Pop.: 3,526 (85.9
Black Voting Age Pop: 462 (11.26
Am. Indian Voting Age Pop.: 11 (0.2
Asian Voting Age Pop.: 95 (2.31
Other Voting Age Pop.: 10 (0.24
Hispanic Voting Age Pop.: 52 (1.2
Total Registered Voters: 2,703 (52.2
Registered Whites: 2,439 (90.23
Registered Blacks: 241 (8.92%)
Registered Others: 23 (0.85%)
Democrats: 1,420 (52.53%)
Republican: 997 (36.88%)
Unaffiliated: 286 (10.58%)
Senatorial Race, Dem. 1990: 939 (58
Senatorial Race, Rep. 1990: 655 (41.0
Lt. Gov., Dem. 1988: 761 (47.45
Lt. Gov., Rep. 1988: 845 (52.55
Ct. of Appeals, Dem. 1988: 638 (43
Ct. of Appeals, Rep. 1988: 819 (56.2
Dismiss
BOUNDARY
State
County
Am. Indian Res.
MCD/CCD
Place
Voting District
Tract
Group
Block
Districts
District Pops: Ideal Actual
1: 552,386 558,470
2: 552,386 552,336
3: 552,386 546,165
4: 552,386 551,774
5: 552,386 552,261
6: 552,386 552,234

EXHIBIT 421 (EXCERPTS)

AN EVALUATION OF NORTH CAROLINA'S 1998 [1997*] CONGRESSIONAL DISTRICTS

Professor Gerald R. Webster
Department of Geography
University of Alabama
Tuscaloosa, AL 35487-0322
Phone (205) 348-1532
Fax (205) 348-2278
GWebster@ua1vm.ua.edu

I am a Professor of Geography at the University of Alabama, Tuscaloosa, Alabama, where I have been employed for the past nine years. My formal education includes a BA (1975) in political science from the University of Colorado-Denver, a MS (1980) in geography from Western Washington University, and a Ph.D. (1984) in geography from the University of Kentucky. My primary research and teaching emphases are in political geography, and range in topical focus from the local to international scales. My research has most emphasized topics in electoral geography including the issue of redistricting. I have authored over 50 publications including more than 30 in refereed journals on varied topics including redistricting. Between 1995 and 1997 I served as the Chair of the Political Geography Specialty Group, Association of American Geographers, the largest organization of political geographers in the world. My Vita accompanies this report.

* References to 1998 congressional districts are to districts used in the 1998 elections held under the 1997 Plan.

On December 9, 1997, I met with representatives of the North Carolina Attorney General's Office and was asked to evaluate the state's twelve congressional districts intended for use in the 1998 elections (hereafter referred to as the "1998 districts"). For this purpose I was provided maps of the 1992-1996 (hereafter referred to as the "1992 districts") and 1998 districts, and access to data from Election Data Services, one of the country's most prominent providers of data on elections and districts. From Election Data Services I secured the majority of the compactness indicators used in this report, and shape files of the congressional districts in selected states including North Carolina.

The purpose of this report is to evaluate the twelve congressional districts now in place for the 1998 elections (Figure 1). Where pertinent, these districts are compared to the 1992 districts (Figure 2). This report uses a set of traditional districting criteria on which to base its evaluation. Basic background reading on these criteria is found in the published work of Professor Richard Morrill (Department of Geography, University of Washington), and Professor Bernard Grofman (School of Social Sciences, University of California, Irvine).

Professor Morrill is a political geographer and the foremost geographic authority on districting procedures in the United States today. His 1981 monograph, *Political Redistricting and Geographic Theory*, includes a chapter entitled "Criteria for Redistricting" which is cited in this report. Professor Grofman is a political scientist and is among the most recognized authorities from that discipline on redistricting

issues. Professor Grofman's "Criteria for Districting: A Social Science Perspective" published in the UCLA Law Review in 1985 is perhaps the most exhaustive evaluation of redistricting criteria published in the past twenty-five years. (Additional sources detailing districting criteria include Dixon 1982; Morrill 1982, 1987 and 1994; Cain 1984; Butler and Cain 1992; Grofman et al., 1992; Grofman 1993; Pildes and Niemi 1993).

REDISTRICTING CRITERIA

What follows is an evaluation of North Carolina's twelve congressional districts on the basis of the following criteria: equal population, contiguity, compactness, the integrity of local government boundaries, and continuity of representation. It should be noted at the outset that it is virtually impossible for a redistricting plan to simultaneously satisfy all criteria perfectly or completely.

In some cases, the real-world application of two criteria may contradict one another. For example, published work on the districting process suggests that the number of county divisions should be limited where possible. But it is nearly always impossible to have no divided counties in the redistricting process due to the constitutionally-based requirement that districts have little or no difference in their populations. Thus, any county with a population above the ideal population will of necessity be divided among two or more districts. And it is frequently necessary or appropriate to divide counties with smaller populations between two or more

districts to achieve compliance with the equality of population criterion or another districting goal. In short, it is indeed rare for a state not to divide some, if not many, counties. At present all southern comparison states include multiple county divisions on their congressional district maps. Twenty-six (38.8%) of Florida's 67 counties, for example, are divided between multiple congressional districts (Duncan and Lawrence 1997: 298-299).

In other cases, data limitations and real-world constraints limit the degree to which one or more criteria may be simultaneously satisfied. For example, a state with an irregular coastline will find it nearly impossible to create highly compact districts in that area of the state. A state which uses county boundaries which follow the irregular courses of rivers will find it difficult if not impossible to create highly compact districts. The pattern of population distribution can also severely limit the degree of resulting compactness. Hence, a state with an uneven population density will likely find it difficult to create highly compact districts while achieving equality of population between districts. An evaluation of districting plans must therefore consider the existing map in light of state or local conditions, and not solely on the basis of theoretical possibilities.

Some explanation of each criterion's purpose precedes the North Carolina specific evaluation. All Tables and Figures referenced in this evaluation are found sequentially at the rear of the report following the references. An Appendix follows the referenced Tables and Figures which includes maps

depicting each of North Carolina's twelve 1992 and 1998 congressional districts.

1) Equality of Population.

The "equality of population" criterion stems from the U.S. Constitution and it therefore must carry substantial, if not preeminent, weight in the development of all redistricting plans. Since the 1960s the legally permissible variations between district populations have declined substantially. Concomitant improvements in technology and the detail of the data provided by the U.S. census have allowed ever-greater adherence to the principal of one-person-one-vote.

Population equality between districts may be measured by multiple indicators. The "total deviation" (also referred to as the overall range) is defined as the population difference between the smallest and largest districts (see Grofman 1985: 175, for the total deviations of districts existing in 1983, and Rayburn and Leib 1994: 23, for the total deviations existing in 1993). The "maximum deviation" is defined as the largest absolute (+ or -) population deviation among a jurisdiction's districts relative to the optimal population (total population/number of seats) to be allocated to each district. Also pertinent is the mean or average of all district deviations from the ideal population. These measures may be expressed in terms of absolute numbers and percents.

The maximum permissible population deviation of districting plans depends on their geographic scale - whether,

for example, the districts are used to elect members of the U.S. House of Representatives, a state legislature, or a city council. Due to the limits of both the census of population data and geography, maximum allowable deviations are generally greater the more local the jurisdiction being evaluated. But congressional districts are expected to have total deviations of less than 1% (Morrill 1981; Grofman 1985; Grofman et al., 1992). As determined by Rayburn and Leib (1994: 23), the districting plans in all states in 1993 were in compliance with this criterion with the largest total deviation determined for Georgia at 0.94%.

The ideal population for each congressional district in North Carolina is 552,386 (1990 state population of 6,628,637 / 12 districts = 552,386.42) (Table 1). The average absolute (+ or -) deviation of North Carolina's twelve congressional districts is 361 individuals, or 0.065% of the ideal population to be allocated to each district. Among the districts, District 7 has the smallest deviation at a mere 4 individuals (0.001%), and District 10 the largest at 947 individuals (0.171%). District 10's deviation thus constitutes the Maximum Deviation for the state's congressional districts. The Total Deviation for the twelve districts is 0.270%.

In terms of the population equality criterion, North Carolina's present congressional districts are well within accepted guidelines. Their level of population equality is therefore evaluated favorably on this criterion. But it should be noted that 1990 census of population data is now eight years old. Based upon population projections by the North Carolina

Office of State Planning, the state's 1997 population was nearly 12 percent greater than enumerated in 1990. That office further projects the next Census, to be undertaken in a little over two years, will enumerate 7.7 million North Carolinians, or 16.4 percent more individuals residing in the state than were counted in 1990. Thus, while the constitutional purpose of the census of population is to aid the reapportionment and redistricting process and the 1990 census should be used for such comparisons, malapportionment is clearly a result of using eight year old data. It is therefore true that any subsequent delineation of North Carolina's 12 congressional districts prior to the 2000 census will be hampered in achieving compliance with the preeminent criterion of the districting process, that of equal population between districts.

2) Contiguity.

There is no Constitutional obligation for congressional districts to be contiguous, though some states include such a requirement in their constitutions variously pertaining to legislative or congressional districts (Grofman 1985). The state of North Carolina does not formally stipulate that congressional districts be contiguous. A district is typically defined as contiguous if every part of the district is accessible to all other parts without traveling into a second district. This requirement has rarely generated controversy in the past. When controversy has emerged, the focus of contention has generally pertained to areas dissected by water features and whether bridge connections are sufficient to constitute contiguity (see Grofman 1985: 84).

All of North Carolina's 1998 districts are contiguous, and are thus evaluated favorably on this criterion. Second, on this criterion the present plan compares very favorably with the state's 1992 congressional districts which generated controversy pertaining to the contiguity of the 6th and 12th districts (Grofman 1993: 1261). The practical contiguity of Districts 1, 2, 5 and 10 was also substantially improved. For example, the proruption of District 2 into District 1 in Halifax County in the 1992 plan no longer exists. In the 1998 plan the mutual boundary of Districts 1 and 2 is the Halifax County-Nash County boundary. A second example pertains to the no longer existing proruption of District 5 into District 10. The boundary between these two districts now entirely follows county boundaries.

3) The Allocation of Local Government or Electoral Units.

The non-division of local political units in their allocation to districts has traditionally been viewed as a legitimate though secondary goal of the districting process. Counties, for example, may constitute political systems in and of themselves. But it is also true that the equal population criterion carries substantially greater weight in all evaluations of districting plans than efforts to limit county subdivisions. Thus, any county which has a population above the ideal population per district will almost certainly be divided into two or more districts in a system which employs single-member districts.

At times it may be either appropriate and/or necessary to subdivide counties with lesser numbers of residents to achieve compliance with the equal population or another districting goal. For example, it may well be appropriate to divide the urban environs of a county from its dominantly rural hinterland given the widely differing circumstances oftentimes found in these two settings. Such divisions can be beneficial to the quality of representation provided to the constituents in a district because Representatives do not have to simultaneously focus their attention on both urban (e.g., mass transit and crime) and rural needs (e.g., agriculture and basic highways). In short, it is nearly always technically impossible in any state with two or more districts for all counties to be allocated in their entirety to congressional districts and meet the goals of other criteria. And there are numerous practical reasons for dividing counties as well. Hence, county divisions are commonplace and all southeastern state comparators include multiple county divisions (Webster 1995; Duncan and Lawrence 1997).

The 1992 congressional districts in North Carolina divided 44 off the state's 100 counties (Webster 1995). The 1998 congressional districts reduce this number to 22, a 50% percent decline in the number of county divisions. This level of county divisions compares favorably with Florida, a state having undergone similar litigation, which divides 26 of its 67 counties, or nearly 40%. Thus, from the perspective of county divisions, the 1998 districts are superior to the 1992 districts on this criterion. Secondly, using Florida for the comparator,

North Carolina's proportion of divided counties is judged acceptable.

The building block units used to delineate congressional districts differ between states. While some states rely on census units such as blocks or tracts, others use voting districts or precincts (Raburn and Leib 1994: 23). For the 1990 census the Bureau of the Census requested that all states participate in an effort to geographically mesh voting districts with other units of census geography. Approximately three-quarters of the states fully participated, with the remainder participating in varying degrees. In North Carolina seventy-nine of the state's 100 counties fully participated and are subdivided by voting precincts which follow the boundaries of other units of census geography such as blocks or tracts (see Rayburn and Leib 1994).

It should be a goal of districting plans to avoid subdividing voting precincts wherever possible unless local circumstances make such divisions appropriate. If voting precincts are subdivided by congressional district boundaries, additional polling units or ballot forms may be required. Such changes can lead to voter confusion and frustration.

As of October 1, 1996, there were a total of 2,531 election precincts in the state of North Carolina. The 1992 districts divided 80 precincts. The 1998 districts reduce this number to only 2. Thus, the 1998 districts are vastly superior to the 1992 districts in their very minimal number of voter precinct divisions. Secondly, it has been conveyed by the

Attorney General's Office to the author that the basis for the 2 precinct divisions pertained to local circumstances. This being true, the 1998 congressional district map must be judged very favorably in terms of its use of precincts as district building blocks.

Of the 31 counties which do not include census voter precincts, only one (Beaufort County) is not allocated to a 1998 congressional district in its entirety. This division employed township boundaries which are vastly superior to the use of census blocks or tracts which may have little significance to human patterns of interaction or governance.

4) Geographic Compactness.

Unlike the equality of population criterion, the geographic compactness criterion has no foundation in the U.S. Constitution. But it has long been viewed as a legitimate criterion for evaluating redistricting plans, and is included as a goal in approximately half of all state constitutions. The state of North Carolina is not among those states legally requiring that the members of legislative bodies be elected from compact districts (Grofman 1985). But given recent Supreme Court decisions, the compactness criterion has received renewed attention.

There is substantial legal and academic disagreement over the value of mandating districts be compact. First, requiring compact districts does not guard against the political or racial manipulation of electoral space. The geographic

resolution and quality of the data now provided by the census in conjunction with the increasing sophistication of computer technology may allow compact districts to be delineated which are also directly discriminatory to a population group. Thus, highly compact districts may be intentionally detrimental to a population group (see both Morrill 1981, and Grofman 1985).

Second, in the real-world perfectly compact districts are an impossibility. Most compactness indices assume that an optimal district will be a perfect circle, the most compact of geometric shapes. But if circles were employed to subdivide the space of a jurisdiction, some of the jurisdiction's area would not be allocated to districts, but be left in the gaps between circles. Thus, circular districts are an unrealistic abstraction without direct application to real-world circumstances.

Third, the building blocks of redistricting plans, blocks, block groups, tracts, or voting precincts, are frequently delineated by streets and are oftentimes square or rectangular in shape. The shapes of these building blocks therefore largely precludes circular districts from being formed.

A fourth concern limiting real world compactness is the constitutional criterion of equality of population discussed above. It is of substantially greater legal necessity to comply with this criterion than to create perfectly compact districts. To meet this constitutional criterion map makers may be forced to create districts of less than perfect compactness. In short, evaluations of the geographic compactness of political districts

must consider the constraints faced by the map maker with substantial attention focused upon local circumstances.

Compactness Indicators Used In This Report

There are a host of different geographic compactness measures available (see Niemi, et al., 1990 for a description of 24 different measures). In general these methods concentrate on a district's perimeter, areal dispersion, or population distribution in their design.

Two compactness measures are used in the present report, both of which are now among the most commonly recognized and applied by legal and academic scholars. Their elevated recognition is due largely to their calculation and application in a 1993 *Michigan Law Review* article by Richard Pildes (Professor of Law, University of Michigan) and Richard Niemi (Professor of Political Science, University of Rochester). Both authors are among the most recognized authorities on redistricting and the courts in the United States today. The purpose of their article was to measure the compactness of all congressional districts in the United States existing in 1993 in such a manner as to parallel the discussion in the Supreme Court's decision in *Shaw v. Reno* (1993). Adding to the relevance of this article and its methods was its citation in *Bush v. Vera*, 1996, as supporting evidence for the Supreme Court's findings that three congressional districts in Texas were unconstitutional.

The first measure is based on the geographic "dispersion" of a district. To calculate this measure a circle is circumscribed around a district. The reported coefficient is the proportion of the area of the circumscribed circle which is also included in the district and ranges from 1.0 (most compact) to 0.0 (least compact).

The second measure is based upon the calculation of the "perimeter" of the district. The reported coefficient is the proportion of the area in the district relative to a circle with the same perimeter and ranges from 1.0 (most compact) to 0.0 (least compact).

Pildes and Niemi (1993: 564) provide some guidance on the evaluation of both measures. With respect to the dispersion compactness measure, they suggest "low" is equal to or less than 0.15. On the perimeter compactness measure they suggest that "low" is equal to or less than 0.05. By suggesting these guidelines they caution that "we do not imply that all districts below those points, or only those districts, are vulnerable after *Shaw*." These cutoff points are therefore best characterized as general guidelines and they should not be employed as absolute indicators of acceptable or unacceptable levels of compactness. Supporting their statement is the fact that in 1998 ten congressional districts in the U.S. are below the 0.05 benchmark on the perimeter measure (e.g., New York's 12th (0.021) and Texas' 6th (0.027)), and 13 are below the 0.15 benchmark on the dispersion measure (e.g., Florida's 22nd (0.0331) and California's 36th (0.042)).

Some Theoretical and Real World Comparisons

In addition to the compactness scores for each of North Carolina's congressional districts, additional scores were calculated for hypothetical and real-world units. The purpose for calculating these additional scores is to provide comparisons for the evaluation of the compactness coefficients for North Carolina's congressional districts. Thus, Figure 3 displays a square circumscribed by a circle. While most would visually evaluate a square district as a highly compact, the geographic dispersion score for the square is .640, and its perimeter compactness score is .785. Similarly, Figure 4 displays a rectangle circumscribed by a circle. Again, while most viewers would visually evaluate a rectangular district as substantially compact, the dispersion compactness of the rectangle is .431 and its perimeter compactness is .641.

Table 2 provides further comparisons in tabular format with selected units also presented in Figures 5-9. Among those units for which the two compactness indicators were calculated are Camden, Davie and Swain counties, the cities of Greensboro, Charlotte and Winston-Salem, and two precincts each in the cities of Greensboro, Charlotte, and Winston-Salem. These additional compactness coefficients provide instructive comparators using real-world geographic units. But it must also be underscored that these units are not directly indicative of the constraints faced by those undertaking the redistricting process. For example, counties are not required to maintain equal populations and their initial geographic delineations were

not constrained by the need to aggregate smaller units of census geography such as tracts and blocks.

With the cautionary notes above in mind, the comparators provided in Table 2 are helpful to contrast the levels of compactness magnitude of real-world political units relative to the square and rectangle examples presented above. Secondly, these more real-world examples are indicative of the contrast in magnitude of the two compactness measures for the same jurisdiction, the perimeter compactness measure generally being lower in magnitude for such units. Thus while Charlotte's dispersion compactness measure is high at .571, its perimeter compactness coefficient is much lower at 0.079. Similar contrasts in the magnitudes of the two coefficients were also found to characterize both Greensboro and Winston-Salem.

The purpose for calculating the compactness coefficients of precincts in the three cities is to demonstrate the constraints posed by the building-block units used by the State of North Carolina in delineating its congressional districts. On the dispersion compactness measure the coefficients range from a low of 0.154 to a high of 0.297 (Table 2). On the perimeter compactness measure the scores range from a low of 0.114 to a high of 0.213. These measures are significant because building-block units of relatively low compactness will generally result in districts of lesser compactness than districts composed of highly compact building-block units.

Added Constraints Facing Map Makers Drawing Political Districts

As noted above, electoral district compactness must be evaluated with flexibly due to the greater number of constraints placed on the process of their formation. The compactness of a congressional district can be limited by a host of conditions beyond the control of the map maker. For example, many counties use meandering rivers as their boundaries. Thus a congressional district with boundaries following such county boundaries would likely have a limited degree of perimeter compactness. Secondly, simple geographic compactness indicators ignore real-world patterns of interaction, population homogeneity and travel.

Using the river example above, a geographically elongated district centered upon a riverine environment where patterns of employment and sociopolitical interaction are focused upon the river may be highly appropriate. Even more appropriate to the current situation is the focus of a district upon major transportation corridors such as freeways. As stated by Professor Morrill, the most distinguished political geographer in the United States with a long standing interest in the districting process,

> A too simplistic application of . . . geographic compactness measures is foolish, especially where the distribution of the population is uneven, perhaps strung out along roads or railroads. Travel may be easier and cheaper in some directions than in others, such that an

> elongated district astride a major transportation corridor might in fact be the most compact in the sense of minimum travel time for a representative to travel around the district.

This passage underscores that there are circumstances under which there are appropriate reasons for districts to be of lesser compactness. An excellent example is Florida's 22nd district (see Figure 12). It is described by Duncan and Lawrence (1997: 367) as

> a shoestring of a district hugging the south Atlantic coast from Juno Beach south to Miami Beach. It is roughly 90 miles long and in some places just a few blocks wide. Its width never extends beyond three miles.

This district reflects the reality that the beaches along central Florida's coast are peopled by comparatively wealthy families as compared to those only three or four miles from the coast. It is represented by Republican Clay Shaw, Jr., and to my knowledge has not been the target of any litigation. Its level of perimeter compactness is 0.0467, while it has the lowest level of dispersion compactness of any congressional district in the United States at 0.0331.

A second example pertains to Illinois' 4th district which has popularly been referred to as the "earmuff district." It has also been described as "C-shaped," "distended," as having an "uncouth configuration," and as resembling a "Rorschach ink blot" (Duncan and Lawrence 1997: 454). While most assuredly

contorted in its geographic design, this district was found to be constitutional by the Supreme Court on January 26, 1998 because it serves a compelling state interest. Its dispersion compactness coefficient is 0.1933, while its level of perimeter compactness is 0.0263. Its perimeter compactness score is the second lowest among congressional districts in the United States today (the lowest is New York's 12th district).

It must be stressed that legislators represent people, and the distribution of the population on the landscape is invariably uneven. Given this unevenness, and the desire to include a requisite number of people with similar social, economic or political orientations, among other competing goals, it is largely an impossibility to universally create districts of perfect theoretical compactness. Such an endeavor would be at odds with quality representation, and likely fruitless in result.

North Carolina's Congressional Districts

In 1992 the mean dispersion compactness of North Carolina's twelve congressional districts was 0.280, with the range being from a low of 0.045 for district 12 to a high of 0.440 for district 6 (Table 3). The mean level of dispersion compactness for the 1998 districts substantially increased to 0.354. While the 12th District continued to be the lowest among the state's 12 congressional districts, its dispersion compactness more than doubled to 0.109. Secondly, this level should be evaluated in light of the district's focus upon major transportation corridors including Interstates 40, 77 and 85. District 7 had the greatest level of dispersion compactness at

0.622. It should be noted that District 7's level of compactness is nearly that of the square displayed in Figure 3.

In 1992 the mean level of perimeter compactness for North Carolina's twelve districts was 0.095 (Table 3). The perimeter compactness coefficients ranged from a low of 0.014 for the 12th district to a high of 0.319 calculated for the 4th district. The mean level of perimeter compactness for the 1998 districts is a substantially increased 0.192. These coefficients ranged from a low of 0.041 for the state's 12th district to a high 0.325 for the 7th district. Again, the 12th district's level of objective geographic compactness should be evaluated in light of its focus upon major transportation corridors in the area.

Table 4 presents the absolute and percentage change in the levels of compactness on both the dispersion and perimeter measures for North Carolina's 12 congressional districts. The average district in North Carolina increased its level of dispersion compactness by 0.075 or 39.1%. The increase in the level of District 12th's dispersion compactness was greatest at 142.2%. District 6's level of dispersion compactness actually fell by nearly 18 percent. This finding underscores that changes in one district very frequently lead to changes in other districts, and the direction of such successive impacts will not necessarily be in the desired direction.

The average level of perimeter compactness for the state's 1998 districts is also well above what existed in 1992 (Table 4). The mean district's level of compactness rose 0.097

or nearly 172%. District 7's increase was the greatest at 525%. District 4's perimeter compactness fell by over 13%.

North Carolina Compared to Other States

Other states have made adjustments to their congressional districts since 1992 because of litigation similar to that experienced by North Carolina. Table 5 compares the means for both compactness indicators in 1992 and 1998 for the state's of North Carolina, Florida, Georgia and Texas. These coefficients are invaluable because they suggest the degree of change impacting all districts within each state. In short, the redrawing of a single district may impact most other districts in a state. Thus, while North Carolina's 12th district was a principal focus of legal challenges, no district in the state was left untouched by the changes to its design.

North Carolina's mean dispersion compactness coefficient is 0.354 for the 1998 districts, higher than both Florida and Texas (Table 5). Its mean dispersion compactness rose by 0.074, or 26.4% between the 1992 and 1998 plans. This mean increase in compactness was the greatest of the four states examined.

North Carolina's mean perimeter compactness coefficient is 0.192 for the 1998 districts, higher than that for Texas (0.164) and similar to that calculated for Florida (0.207) (Table 5). In terms of absolute change, North Carolina's mean level of perimeter compactness rose from 0.095 to 0.192, or by 0.097. In terms of both absolute and percentage change, this

level of increase was the greatest among the four states examined, doubling the percentage increase of second place Georgia.

Table 6 specifically compares the levels of compactness for North Carolina's 12th congressional district with other challenged districts in North Carolina, Florida, Georgia, Illinois and Texas. As can be ascertained from the Table, the increase in the 12th district's level of dispersion compactness is second only to Georgia's 11th district among those examined. While the 12th district experienced the second smallest level of increase among the set of districts considered on the perimeter compactness measure, its increase was substantial at 192.9%.

The levels of compactness for North Carolina's twelve districts are substantially increased in the 1998 districts as compared to the 1992 districts. Thus, the system as a whole experienced a substantial increase in compactness. At present eleven of the state's twelve districts are above the benchmarks suggested by Niemi and Pildes (1993) as indicative of "low" compactness. While the 12th congressional district's level of compactness remains marginally below the suggested benchmarks, its level of increase is substantial and is comparable to that of redrawn districts in other states. Secondly, and in reference to the earlier quote by Professor Morrill, evaluations of the 12th district's geographic compactness should also consider its travel time compactness. Travel times are rarely a direct function of straight line distances. Rather the available travel modes and directness of traffic corridors between points must also be considered. Thus

it is highly probable that the time needed for the 12th district's representative to travel to meet constituents at opposite ends of the district is substantially less than in many if not most other more geographically compact districts.

5) Continuity of Representation.

It is counterproductive to fundamentally alter the system of districts in a state each time new districts are delineated. Wholesale change may lead to voter confusion and frustration, and thus non-participation. While the goal of preserving the integrity of the district system may be difficult if a state has experienced substantial population growth in the decennial districting cycle, boundary "stability helps to develop and maintain a sense of identity with districts" (Morrill 1981: 27). The goal of maximizing the continuity of representation is particularly important when changes occur in the middle of the normal decennial redistricting cycle. Thus the voters of the state of North Carolina have now experienced two significant changes to their district association in the past seven years, with a third necessarily coming for the 2002 election cycle.

It is clear that the 1998 congressional districts are significantly different from those employed in the elections of 1992, 1994, and 1996. It is also clear that effort was expended to maintain the geographic cores of the 1992 districts in the 1998 remap. Table 7 presents the proportion of each district's area in 1992 which remains in the 1998 districts. On average 76.4% of the area in each of the state's twelve districts in 1992 was preserved in the 1998 districts. This proportion ranges

from a high of 96.7% for the 11th district to a low of 41.6% for the 12th district. Thus, the 12th district was more dramatically redrawn than any other district in the state. By comparison, when Florida's 3rd district was redrawn under similar circumstances, 48.4% of the area of the early 1990s district was preserved in the current district (see Figures 10 and 11).

The changes created by the redrawing of North Carolina's congressional districts also shifted one-quarter of the state's population to a different district, a very substantial movement of the population between districts even for a decennial redistricting (Table 8). The impact on individual districts ranged from a low of 7.6% of District 11's population being shifted, to a high of 40.5% for District 2's population. Districts 1, 2, 4, 5, and 12 all had more than 30% of their residents shifted to another district in the 1998 remap. Clearly, such substantial shifts from one representative to another can be unsettling for many constituents.

Attention to balancing the legal necessity for change with the interests of those represented is appropriate in all districting cycles, but most particularly for those changes in the middle of the normal decennial cycle. The changes in the 1998 districts as compared to the 1992 districts cannot be characterized as minimal. Rather I would characterize the change as moderate because attention was paid to maintaining the geographic cores of the 1992 districts (I would characterize extreme change as a plan that paid no heed to the existing geographic cores of the former districts). Thus, on this criterion I evaluate the efforts of those producing the remap

favorably because of their balance in complying with the June 1996 court order while preserving a moderate level of continuity of representation for residents of the state's twelve congressional districts.

Conclusions

The purpose of this report was to examine the twelve 1998 congressional districts in the state of North Carolina from the perspective of five traditional redistricting criteria. Where appropriate the current districts were compared with those first used in the 1992 congressional elections. The findings of this report are summarized below.

1) Equal Population.

The total deviation of the 1998 districts is 0.270%, well below the generally accepted guideline of less than 1.0%. Thus the present districts are evaluated positively on this criterion.

2) Contiguity.

All twelve of North Carolina's 1998 districts are contiguous and are therefore evaluated positively on this criterion. Secondly, the level of practical contiguity in the 1998 districts is substantially increased over that existing in the 1992 districts, particularly as this criterion relates to the 6th and 12 districts. Thus, when considering the change between the 1992 and 1998 districts, the current plan is evaluated very favorably.

3) The Allocation of Local Government or Electoral Units.

The 1998 districts reduce the number of divided counties from 44 in 1992 to 22 at present. This is a substantial reduction and the present plan is therefore evaluated favorably from this perspective. Secondly, the 1998 districts effectively employed voting precincts as building blocks with only 2 of the 2,531 census defined precincts in the state being divided. Of the 31 counties not subdivided by census defined voting precincts, only one was divided in the districting process. In this case (Beaufort County), township boundaries were used, which are far better building blocks than census blocks or tracts.

4) Geographic Compactness.

The level of compactness determined for the 1998 districts is substantially improved over that existing in the 1992 districts. At present only the 12th congressional district is marginally below the suggested guidelines for judging "low" compactness. But such judgements should also consider the rate of change for the 12th, which was found here to be very substantial and in line with the magnitude of change experienced for other districts ordered redrawn by the court system. Secondly, the 12th's level of compactness is similar to other existing districts not under challenge (e.g., Florida's 22nd, see Figure 12), and at least one district found constitutional by the Supreme Court (e.g., Illinois' 4th). Finally, Professor Morrill's 1981 argument that elongated districts which center

upon transportation corridors may be highly compact in terms of travel time is pertinent.

5) Continuity of Representation.

The redrawing of North Carolina's 1992 congressional districts introduced substantial change in the state's system of representation. On average, 24% of the area in the 1992 districts was allocated to a different district on the 1998 map. Most dramatic was the impact upon the 12th congressional district - the 1998 district includes only 42% of the original area of the 1992 district. Similarly, nearly 26% of North Carolina's population was moved to a different district in the 1998 plan as compared to the 1992 map. The magnitude of this change is substantial, most particularly in a mid-decennial redrawing of the state's congressional districts. In short, those undertaking the remap appear to have sought balance between the necessity of district boundary change and the preservation of representational continuity.

[This page intentionally left blank.]

EXHIBIT 426 (EXCERPTS)

ADDENDUM TO "AN EVALUATION OF NORTH CAROLINA'S 1998 CONGRESSIONAL DISTRICTS [1997 PLAN*]"

Professor Gerald R. Webster
Department of Geography
University of Alabama
Tuscaloosa, AL 35487-0322
Phone: (205) 348-1532
Fax: (205) 348-2278
Email: GWebster@bama.ua.edu

In February 1998, I submitted an evaluative report to the North Carolina Department of Justice which included an examination of the geographic configuration of North Carolina's congressional districts as delineated in the state's 1997 plan. The districts evaluated were intended for use in the 1998 congressional elections though subsequently replaced due to the litigation in *Cromartie v. Hunt* (E.D. NC). In late August 1999 I was again contacted by the North Carolina Department of Justice and informed that the case was proceeding to trial. At that time I was asked to consider the results of additional *Shaw* related cases on district compactness in other states since the submission of my report in early 1998. This addendum is intended to update my report in terms of district compactness changes due to *Shaw* related litigation in other states since that time. It therefore specifically relates to the subsection in my report entitled "North Carolina Compared to Other States" (pp. 21-23) and Tables 5 and 6.

Since the submission of my original report the states of Virginia and New York have undergone *Shaw* related litigation which resulted in the redrawing of some congressional districts in both states. In New York the 12th congressional district was challenged, eventually found unconstitutional, and redrawn in advance of the November 1998 elections. In Virginia the 3rd congressional district was challenged, found unconstitutional, and redrawn prior to the November 1998 congressional elections. It is the purpose of this addendum to present the level of change in congressional district compactness resulting from these cases in comparison format.

The data used in this addendum were secured from Election Data Services, one of the country's most prominent providers of data on elections and districts. Election Data Services also provided the bulk of the data used in my earlier report. The data presented here are therefore directly comparable to those employed in my 1998 report. The data secured from Election Data Services were computer files ("district shape files") delineating the geographic extent of all districts in New York as existing in 1992-1996 and 1998, and in Virginia as existing in 1992, 1994-1996 and 1998.

The state of Virginia undertook voluntary technical adjustments to multiple congressional districts in 1993 to avoid splitting newly defined voting precincts. Due to these adjustments, either the 1992 or 1994-1996 districts (hereafter referred to as the "1994 districts") might be employed to gauge changes in district compactness. As a result, two sets of calculations are offered for districts in the state of Virginia.

First, the change during the entire period from 1992 to 1998 are calculated. Second, the compactness change in Virginia's districts between 1994 and 1998 are calculated. In my opinion the calculations for the period 1994 to 1998 are more relevant for assessing litigation induced change in the levels of compactness associated with Virginia's congressional districts.

For the purposes of this analysis, the levels of compactness for all districts in both states were calculated for each of the relevant benchmark years by the University of Alabama Cartography Laboratory. The results of these calculations are presented in "Addendum Table 5" and "Addendum Table 6." Maps are included of New York's 12th congressional district before and after changes were made to comply with the court decision (Figures A1 and A2). Three maps are included of Virginia's 3rd congressional district reflecting its original configuration in 1992 (Figure A3), its geographic extent after voluntary technical adjustments were made by the state in 1993 (Figure A4), and depicting its shape after it was redrawn as a result of litigation for use in the 1998 congressional elections (Figure A5).

RESULTS

In 1992 (districts used from 1992-1996) the mean dispersion compactness of North Carolina's twelve congressional districts was .280, lower than for New York's 31 districts in 1992 (.307) or Virginia's eleven districts in either 1992 (.314) or 1994 (.313) (see Addendum Table 5). But the mean dispersion compactness of North Carolina's districts

(.354) in the 1997 plan was above the levels in the 1998 districts for either New York (.322) or Virginia (.340). Thus, in absolute terms North Carolina's post-*Shaw* districts as delineated in the 1997 plan were on average of greater dispersion compactness that those in either New York or Virginia after similar court challenges. While the average North Carolina district increased its level of dispersion compactness by 26.4% (1992 districts versus 1997 plan districts), the average New York district had its dispersion compactness increased by 8.1% between 1992 and 1998. Similarly, the average Virginia district had its level of dispersion compactness increased by 8.6% between 1994 and 1998.

In 1992 (districts used from 1992-1996) the mean perimeter compactness of North Carolina's districts was .095, significantly less than the means for New York (.204) or Virginia (.185) (see Addendum Table 5). But the North Carolina districts as redrawn in the 1997 plan had an average level of perimeter compactness of .192, above the mean for Virginia's redrawn 1998 districts (.190), though below the mean for New York's 1998 redrawn districts (.220). The average rate of improvement on this compactness measure for North Carolina's twelve districts between 1992 and the 1997 plan was 102.1%, several times the rate of improvement in either New York (+7.8%) or Virginia (+6.7%).

The rate of change in the specifically challenged districts in the three states also underscores North Carolina's efforts to redraw its districts after *Shaw* in the 1997 district

plan. For example, North Carolina's 12th district in the 1997 plan increased its level of dispersion compactness by 142.2% from its level in 1992. This compares to the 107.3% increase in New York's 12th between 1992 and 1998, and a -10.5% decline in the dispersion compactness of Virginia's 3rd congressional district between 1994 and 1998. In terms of the rate of change in the levels of perimeter compactness, North Carolina's 12th congressional district in the 1997 plan increased 192.9% from its geographic configuration in 1992. This was over three times the rate of increased perimeter compactness of Virginia's 3rd district (+60.0%) between 1994 and 1998, though less than the rate of increase in New York's 12th (+361.9%) between 1992 and 1998.

CONCLUSIONS

The purpose of this addendum was to add two comparison states to my original report as submitted in early 1998. The above analysis indicates that the rate of increase in the levels of geographic compactness for districts in North Carolina's 1997 plan is quite comparable if not significantly better than that accomplished by New York and Virginia in the court mandated redrawing of their districts prior to the 1998 congressional elections.

[This page intentionally left blank.]

EXHIBIT 429

THIRD AFFIDAVIT OF DAVID W. PETERSON, PHD

[Caption omitted in printing]

DAVID W. PETERSON, PHD, being duly sworn, deposes and declares the following:

Identity

1. As indicated in my first affidavit, I am president of PRI Associates, Incorporated, a company whose chief activity is providing statistical litigation support. I am also a retired statistics professor. Further detail about my qualifications is set forth in my first affidavit, and in the resume attached to that affidavit.

Assignment

2. I am retained in this matter by the defendants to respond to and comment on several issues raised by plaintiffs in their Motion in Limine to Exclude the Testimony of David West Peterson ("Motion in Limine"). In particular, these issues are

a. The key requirements of a logical and scientific demonstration that race was the predominant factor in the defendants' choice of a congressional district boundary;

b. Statistical precedents for my analysis;

c. The effect of anomalous data on my analysis;

d. The meaning of testability in the context of a scientific inquiry;

e. Various assertions by plaintiffs in their Motion.

Conclusions

3. For reasons set forth below, it is my opinion that

a. To support plaintiffs' case, a statistical analysis must demonstrate that the empirical evidence is statistically significantly incompatible with the reasons advanced by the defendants for their choice of boundary, and that there is no apparent reason other than race that accounts for the boundary. There has been no such demonstration in this case of which I am aware, and none of the variations on my analysis suggested by plaintiffs constitutes such a demonstration. The import of all of my analysis as well as those variations suggested by plaintiffs is that race and party affiliation are almost indistinguishable as explanations for the boundary of the Twelfth Congressional District defined in 1997 Senate Plan A. That overall result supports the defendants' case; it does not support the plaintiffs' case.

b. Plaintiffs argue that my segment analysis, as they call it, is without precedent and partly for that reason should not be admitted into evidence. On the contrary,

that analysis is based on three operations used throughout not only the theory and practice of statistics but also in everyday life. These operations are (i) the comparison of two numbers to determine which is greater, (ii) the counting of a number of objects, and (iii) the calculation of simple percentages. Such methods are central to an entire branch of statistical methods called "non-parametrics," which includes several measures of correlation which, like the one I use in my analysis, are based on counts and percentages. As statistical applications go, my segment analysis is very straightforward and easy to understand, and there is little danger that a trier of fact will accord it either more or less evidentiary weight than it deserves.

c. Plaintiffs point out that the data on which my analysis is based contain several anomalies. There are some precincts for which the numbers of registered voters exceed the numbers of residents of voting age, and some precincts for which the numbers of people in the different racial categories sum to a number different from that stated as the total. Plaintiffs also point out that while Davie County does have precincts within each of which voting results are tallied, the details of those tallies in that one county are not used in my study. Plaintiffs are correct in suggesting that this indicates an inconsistency between the actual numbers of people in a precinct at a given moment in time and the numbers in the data file on which my studies are based. But such inconsistencies are completely

irrelevant if, as is represented to me, the data used by the General Assembly in choosing congressional district boundaries are the data on which my analysis is based. The issue here is not whether the Assembly used correct data, it is whether, using whatever data they used, the Assembly relied predominantly on racial information contained therein. Therefore, the data anomalies noted by plaintiffs are irrelevant and should not be a basis for excluding my testimony.

d. Plaintiffs argue that because the particular type of analysis I use has not been used in exactly the same form in previous cases or in published literature, it should be excluded because it is "untested." This argument misconstrues the meaning of testability almost surely intended by the Court in *Daubert*. In using this term, the Court was referring to the quality of a proposition that permits its truth to be ascertained either by logical inference or by experimental observation. My method of analysis poses a testable question: Does race provide a statistically significantly stronger explanation of the boundary of the 12th District than does party affiliation? The answer is, it does not; the two factors provide about equally complete explanations, and of the two, the party affiliation explanation is marginally more complete. There is no indication that race predominated over party affiliation in the drawing of the boundary.

e. Many of the assertions made by plaintiffs in their Motion are either misleading, wrong or irrelevant; the details are provided in paragraphs 18 - 37 below.

Underlying Data

4. In reaching the above conclusions, I rely on the October 18, 1999 Plaintiffs' Motion in Limine to Exclude the Testimony of David West Peterson and the same computerized data base on which my first affidavit is based.

Requirements for Demonstrating that Race was Predominant

5. There is a standard statistical paradigm for interpreting circumstantial data to determine whether they suggest that race may have influenced a group of decisions. This paradigm is widely used in employment discrimination (e.g., *Hazelwood School District v. United States*) and jury selection (e.g., *Castaneda v. Partida*) litigation. This paradigm is as follows. An idealized decision process not based on race is hypothesized, and the data are examined in light of this hypothesized model. If the data are statistically significantly inconsistent with the model in a manner correlated with race, one concludes that the model does not accurately reflect the actual decision process, and that some additional factor correlated with race (if not race itself) influenced the actual decision process. In the absence of a non-discriminatory justification for the inconsistency, the inference is raised that the decisions were influenced at least in part by considerations of race.

6. As applied to the matter of drawing the boundary defining a congressional district, one form of this paradigm is to ask first how well a proposed boundary correlates with party affiliation, second, how well it correlates with racial identity, and finally, whether the correlation with race is significantly stronger than the correlation with party affiliation. If it is not, the proper conclusion is that, by this statistical measure, race appears not to have predominated over party affiliation in the drawing of the boundary. If race did not predominate over party affiliation, then clearly it was not the predominant factor in the choice of the boundary.

7. Note that, as with nearly all analyses of circumstantial evidence, one cannot conclude unequivocally either (i) that race played no role in the choice of boundary or that (ii) it did play some role. The most that can be inferred from any objective analysis of circumstantial data is that it tends to support a particular one of these propositions more strongly than the other. Dr. Weber's positive conclusion that "race was the predominant factor" is simply not within reach of objective science.

Precedents for My Analysis

8. My segment analysis, as plaintiffs' call it, is just a systematic tallying of the characteristics of the segments forming the boundary of the 12th District. Compared with such common statistical procedures as regression analysis or Fisher's Exact Test, it is very straightforward, easy to understand and unlikely to mislead. It also has the virtue that it lends itself easily to calculations of statistical significance,

though in this case that is not necessary because the results are so nearly perfectly balanced between the race and party hypotheses.

9. The use of tallies as the basis for examining and interpreting empirical data is well-established in both theory and practice. See E. L. Lehmann, *Nonparametrics: Statistical Methods Based on Ranks*, Holden-Day, 1975 for an extensive account of statistical methods of analysis based on counts of binary comparisons.

Effects of Data Anomalies

10. Plaintiffs point out that the data on which I rely are anomalous in several respects, namely:

> There some precincts for which the numbers of registered voters exceed the numbers of residents of voting age,
> There are some precincts for which the numbers of people in the different racial categories sum to a number different from that stated as the total, and
> While Davie County does have precincts within each of which voting results are tallied, the details of those tallies in that one county are not used in my study.

11. The reason that the number of registered voters in a precinct might exceed the number of people of voting age who reside there is that the numbers come from two different sources, and probably pertain to two different times. The population data come from the 1990 US census, and reflect the population as of April 1990. The voter registration counts are

from some date unknown to me, but I have no reason to believe that it is April 1990. More importantly, the voter registration counts probably include people who once lived in the precinct but who have since moved away. There is no practical way to keep a precinct's list of registered voters absolutely current; it will almost always overstate the actual number of voters actually eligible to vote in the precinct.

12. The reason that in some precincts, the numbers of black, white and other voters do not add up to the total number of voters is most likely due to the manner in which the precinct level data were distributed when constructing the data base. Each precinct is a geographic area comprising one or more smaller geographic areas called blocks. Blocks are standard geographic units defined and used by the US Bureau of Census for reporting the results of the decennial census. The various voter counts for a precinct were allocated among its blocks, and the counts falling within a block were rounded to the nearest whole person. For example, in a precinct having 100 black registered voters and three blocks, this allocation process might assign 23.33 black voters to the first block, 40.33 to the second, and 36.33 to the third. Rounded off, these numbers become 23, 40 and 36. In processing these data, the first step taken by the computer programs used by the State and by me is to add up the counts for all the blocks in a precinct to obtain the totals for that precinct. In this case, the total is 99, not the original 100. In like fashion, the number of white voters associated with the precinct may be altered, the number of other minorities, and the total number of registered voters. Thus a precinct's numbers of black, white, other minority and total registered voters might be transformed from, say, 100, 500, 10 and 610, respectively, to

99, 498, 11 and 612. The former numbers add up (100 + 500 + 10 = 610) but the latter do not (99 + 498 + 11 = 608, not 612).

13. In Davie County, voters register and vote in geographic areas called precincts just like they do in other counties. However, the data in the file on which the General Assembly and I rely do not reflect these data precinct by precinct. Instead, the precinct level data for Davie County apparently were aggregated up to the county level, and then allocated to the minor civil divisions (MCDs) into which the county is partitioned. An MCD is an entity defined by the US Bureau of Census, and it consists of one or more blocks. The allocation of county-wide voter data in Davie County to its MCDs was done in such a way that every MCD appears to have the same fraction of republican and democratic voters. While this is almost surely not true, it is the way the file was constructed.

14. While the anomalies cited in 11 - 13 above put the data somewhat at odds with reality, they have no effect whatsoever on my inquiry. The General Assembly used these data, however anomalous, to define the 12th District, and the central question is whether, when using these data, the Assembly used the racial information contained therein as the predominant factor in setting the course of that boundary. I have used these same data, however anomalous, to determine whether race or party affiliation correlate better with that boundary. The presence of these anomalies in no way tarnishes my analysis, or renders it less probative than it otherwise would be.

The Meaning of "Testability"

15. The Supreme Court in *Daubert* indicated that one factor that might bear on a trial court's inquiry into the suitability of proffered expert testimony is "[w]hether a theory or technique can be and has been tested." The Court here was surely referring not to the extent to which a theory or technique has been used in the past, but rather to the extent to which it can be shown empirically or logically to be true or correct.

16. As an example, consider the technique used by plaintiffs' expert, Dr. Weber. It fails to pose a testable question. Dr. Weber merely collects data tending to support the proposition that race was the predominant factor in the construction of the 12th District. His technique does not entertain any alternative to that proposition, and therefore is doomed to produce the conclusion that race was the predominant factor. Had he applied his method of analysis, without change, to political affiliation instead of race, he would have been forced to conclude that political affiliation was the predominant factor in the construction of the 12th District.[1] Since it is not possible for both of these propositions to be true, there must be something wrong with Dr. Weber's method of analysis. The flaw is that he does not pose a testable question.

[1] I have verified that this is so by recreating Dr. Weber's tables using party affiliation instead of race. Not only does one conclude, by Dr. Weber's methods, that political affiliation was the predominant factor in the construction of the 12th District, one concludes that political affiliation was also the predominant factor in the construction of the 1st District.

17. My analysis poses three testable questions:

To what extent does race correlate with the boundary of the 12th District?

To what extent does party affiliation correlate with the boundary of the 12th District?

Of the two correlations, does that with race predominate?

I answer those questions, objectively.

Miscellaneous Issues

18. Motion in Limine, p. 3, Note 1: Plaintiffs' complain that in calculating the fraction of a precinct's registered voters who are republicans and the fraction who are democrats, I excluded from the denominators people who were neither republicans nor democrats, namely the independents. This is true, and I did it purposefully to keep those percentages directly analogous to all other percentages I used in my analysis. Nevertheless, I reran all of my segment studies using percentages calculated by including people registered as independents, as plaintiffs imply I should, and there is not one single segment among the 234 constituting the border of the 12th District whose qualities are altered. In this case, the issue raised by plaintiffs not only has no material effect on my analysis, it has no effect whatsoever.

19. Motion in Limine, p. 4: Plaintiffs claim that I have assigned each MCD in Davie County the same composition of voters, but that is not true. The data base I was given already contained that assignment; it was not something I did.

20. Motion in Limine, p. 5, Note 4: Plaintiffs raise the specter of a segment having "2,000 African-Americans out of 3,000 total population in the inside precinct and 5 African Americans out of 30 total population in the outside precinct." Only five of the 234 segments bordering the 12th District involve population disparities comparable to these counts, and these are the five excluded from most of my analysis because they do not have complete information about party affiliation. No precinct among the 229 used in most of my studies has fewer than 614 people, and most have several thousand.

21. Motion in Limine, p. 8: Plaintiffs assert here, with reference to my twelve race-party pie chart comparisons, that "if there were more Type R divergent segments than Type P [in a given one of the twelve pie charts] [I] concluded that the combination supported the Race Hypothesis." This is an overstatement. My testimony was and is that in all twelve charts, there is an almost even division between segments favoring the Race Hypothesis and those favoring the Political Hypothesis; in no chart does one type predominate over the other to a statistically significant extent. On balance, there are a few more segments favoring the Political Hypothesis than the Race Hypothesis.

22. Motion in Limine, p. 9: Plaintiffs suggest that it would be appropriate to exclude segments from my analysis that border Davie County. I can think of no principled basis for doing so. The Davie County MCD data, right or wrong, are the data available to the General Assembly through its computer system and on which I understand it relied.

23. Motion in Limine, p. 9, Note 6: Plaintiffs indicate that if the Davie County segments were removed from my analysis, then the number of remaining segments that are unequivocal in their support of the Race Theory would be four, while the number unequivocal in support of the Political Theory would be three. However, this does not make plaintiffs' case; it leaves the two theories virtually indistinguishable, just as they are under my analysis. An imbalance of four to three is not statistically significant, and does not suggest that race is a significantly more complete explanation for the boundary than is party affiliation.

24. Motion in Limine, p. 10: Plaintiffs make much of the fact that, at my deposition, I could not recite the locations of the various segments. The locations of the segments are well-documented and not at all ambiguous. I just happened not to have that documentation at hand at my deposition.

25. Motion in Limine, p. 17: Plaintiffs assert that "Peterson's calculations and results cannot be independently verified." That is absurd. My affidavits explained what we did, and we gave plaintiffs the computer program detailing exactly what we did down to the last digit. My work is 100% verifiable on the record provided to plaintiffs.

26. Motion in Limine, p. 18: Plaintiffs assert that my segment analysis has not been subject to peer review. It is at the moment being subjected to very careful review by plaintiffs, and as yet they have not set forth any sustainable objection to it. Furthermore, the Supreme Court had no difficulty understanding my analysis; indeed, the Court gave it

considerable credence in reaching its opinion. The analysis answers the questions asked of it, and the answers do not help plaintiffs. Furthermore, the questions posed by plaintiffs' expert Dr. Weber are so inartfully and unscientifically phrased that the answers he obtains do not help plaintiffs either.

27. Motion in Limine, p. 18: Plaintiffs make much of the fact that at my deposition I

did not recall that some precincts involved in my study were non-contiguous. Whether they were or not and how they were treated in my study are both well-documented and perfectly logical; it is of no importance that, in the absence of that documentation, I did not recall the details at my deposition.

28. Motion in Limine, p. 18: Plaintiffs assert that I "did not bother to look at the differences in race and party in the convergent segments, and thus arbitrarily discarded approximately 80% of [my] segment observations." That is not true. I did three types of analysis. In the first of the three, I used all of the segments, both convergent and divergent. It was that study that produced the observation that almost 80% of *all* segments have a higher representation of African-Americans inside than out, and that slightly more than 80% of them have a higher representation of democrats inside than out. In the second and third studies, I set aside the convergent segments and studied only those for which the race-party qualities diverge.

29. Motion in Limine, p. 19: Plaintiffs assert that "Of a total of twelve differing measurements, [I] report that seven result in a pattern of divergent boundary segments favoring the

political hypothesis over race, three result in a pattern favoring the race hypothesis over the political, and two result in a pattern equally strong for both. ... These variable results show the unreliability of the analysis." This is absurd. Each of the twelve analyses conveys essentially the same message: Measure how you will, there is almost the same level of support for the race hypothesis as for the political hypothesis. Twelve times that same message is repeated. That is a highly consistent and reliable result. On balance, the data tip slightly in favor of the party hypothesis, but these twelve comparisons are in no sense inconsistent.

30. Motion in Limine, p. 19: Plaintiffs again suggest that it would be proper to cast out the three of my twelve comparisons that use voter registration to identify party preferences, and also to cast out the segments bordering Davie County. While there may be a good argument for according the three voter registration comparisons less weight than the others, I do not think they should be ignored altogether.[2] I can think of no valid reason for excluding the Davie County segments.

31. Motion in Limine, p. 21: Plaintiffs assert that I am not qualified to testify as a political scientist, a point I do not dispute. I am a statistician, and my task is to comment on the quality of Dr. Weber's statistical reasoning, and to assess the statistical evidence bearing on the issue of whether race was the

[2] If one does cast out all comparisons based on party affiliation according to voter registration, the number of unequivocal divergent segments increases from ten to twelve, seven of which favor the Party Hypothesis.

predominant factor in the construction of the boundary of the 12th District.

32. Motion in Limine, p. 22: Plaintiffs assert that "segment analysis" has no non-judicial usefulness. That's rather like saying that adding up yesterday's laundry bill has no usefulness outside of that one transaction. In a sense that is true, but it is a trivial sense. My analysis is founded on widely used and accepted principles involving (i) calculating percentages, (ii) comparing two numbers to determine which is greater, and (iii) counting up the number of items that have certain properties. Such operations underlie several commonly used methods for statistical analysis, including the calculation of certain kinds of correlations. Furthermore, they provide a foundation for calculations of statistical significance, should that be necessary. (In this case it has not been necessary, since the balance between race and political theories is so close, and generally tipped slightly in favor of the political.)

33. Motion in Limine, p. 23-4: Plaintiffs assert, following its argument that all Davie County segments should be withdrawn from my analysis, that my segment analysis wouid not support my final conclusion. They claim that the final count of unequivocally divergent segments would total seven, of which four tip in favor of the race hypothesis. But such a result is highly consistent with my results – the proper statistical conclusion is that there is virtually no difference in the amount of evidence supporting each of the two theories. In that case, plaintiffs still fail to demonstrate that race was the predominant factor, because it clearly does not predominate over the factor of party affiliation. Left moot is the possibility

that there may be additional factors over which race does not predominate -- for purposes of deciding this case it suffices to show that there is at least one such factor, and I have done so.

34. Motion in Limine, p. 23, Note 17: Plaintiffs note that in Charlotte's Precinct 77, the data base indicates that 515 votes were cast for the democrat in the 1988 Lt. Governor election, and 217 votes for the republican. In contrast, a paper document attached to the Motion indicates that there were 1257 votes from that precinct for the democrat and 529 for the republican. According to the first set of figures, 515 /(515 + 217) = 70.4% of the votes cast from that precinct were for the democratic candidate. According to the second set of figures, 1257/ (1257 + 529) = 70.4% of the votes cast from that precinct were for the democratic candidate – the same percentage as that obtained from the first set of figures. Thus it makes no difference at all to my analysis which set of figures is used. I used the ones that were available on the computer data file that linked into the program I believe was actually used to construct the 12th District.

35. Motion in Limine, p. 24: Plaintiffs assert that my testimony is not relevant. On the contrary, it seems highly relevant to me that the court know the answers to the following questions:

To what extent does the boundary of the 12th District correlate with race?

To what extent does the boundary of the 12th District correlate with party affiliation?

Does race correlate with the boundary to an extent significantly greater than does party affiliation? That is, does the statistical evidence suggest that race predominated over party affiliation in the definition of the 12th District?

36. Motion in Limine, p. 27: Plaintiffs assert that "[i]t is startling that [I don't] even know where any of the particular precincts in [my] segments actually are on the map." The 234 segments and their relationship to the precincts bordering the 12th District are both logical and well-documented. With a properly annotated map and documentation in hand, anyone can trace the connections. Plaintiffs refer here to what I was able to recollect from memory at the time of my deposition, without that documentation at hand.

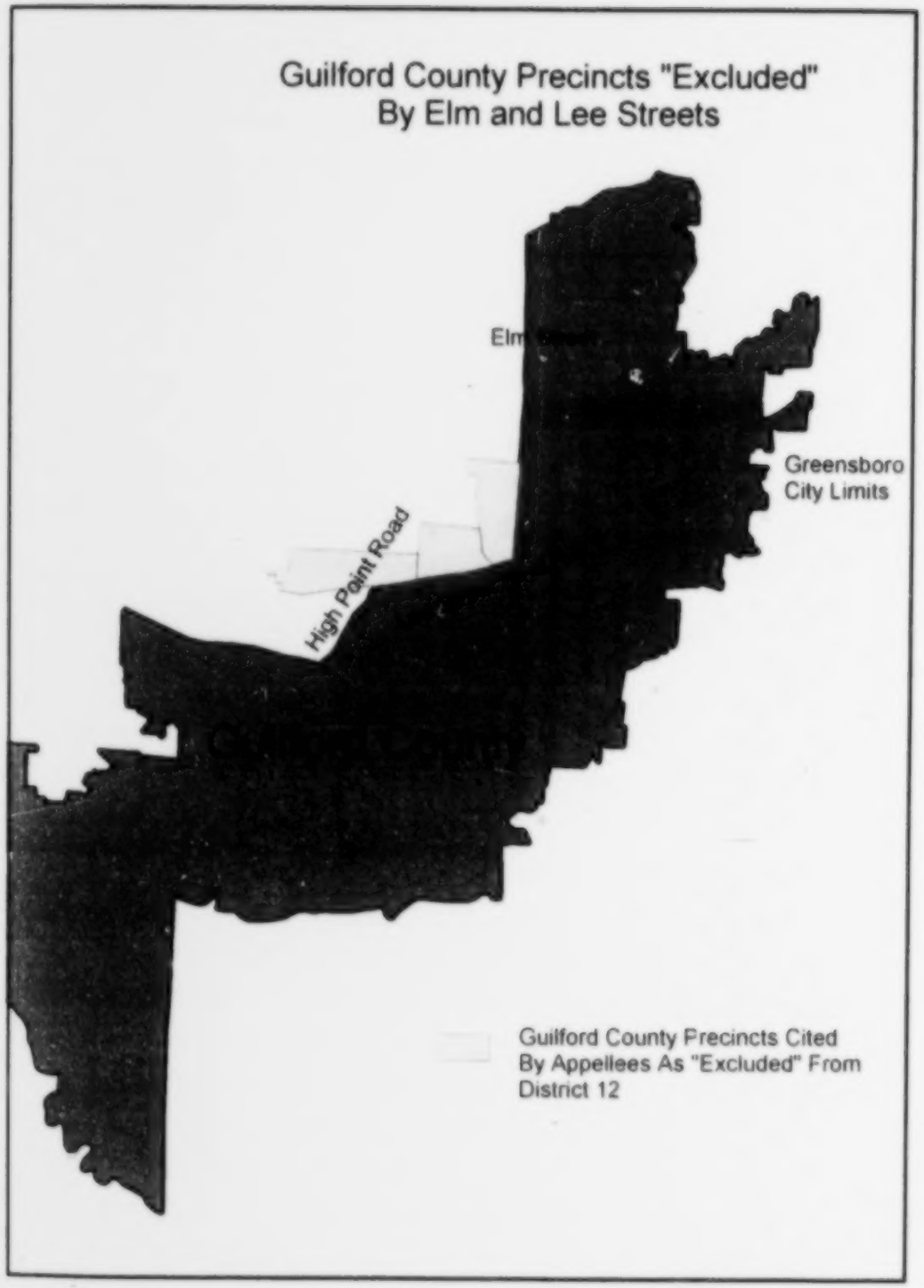
37. Motion in Limine, p. 27: Plaintiffs assert that my segment analysis has no practical relevance to the actual decisions made to include or exclude particular precincts along the boundary of the 12th District. I disagree. In an employment discrimination case, one may compare the average pay of women in a job to that of the men. The difference in those averages is a clue to whether the employer discriminates by gender. The employer may never have done that calculation, but that does not mean that the calculation is irrelevant to the issue of discrimination. In like fashion, the correlation of the boundary of the 12th District with race is highly suggestive of the extent to which race may have been a factor in its definition. It is absurd to hold that this correlation is irrelevant.

Further the Affiant saith naught.

/s/ David W. Peterson, PhD

[Notary acknowledgement omitted in printing]

[This page intentionally left blank.]



[This page intentionally left blank.]

DON NICHOLS BAKER DEPOSITION (EXCERPTS)

[*4] . . . If you would state your name, residence, occupation?
A My name is Don Nichols Baker. I am District Director with the office of Congressman Melvin Watt, 12th District North Carolina.

* * *

[*4] Q Did you say your title was District Director for Mr. Watt?
[*5] A That is correct.
Q What are the duties of that position?
A We have three district offices, fixed offices, in the present district: one in Winston-Salem, North Carolina, one in Salisbury, North Carolina, and one in Charlotte, North Carolina, and a number of satellite offices that works out of those fixed offices.

My responsibilities is constituent services, to provide services to the residents of the 12th Congressional District. We work with individuals on cases, primarily federal government agencies, IRS, INS, those type of issues. We also try to provide the residents of the 12th District with information that is coming from the federal government, grants--notices to let them know that there are grants available to them, municipalities, working with the municipalities within those cities and towns within the 12th District.
Q How many people are in Mr. Watt's office altogether?
A We have two individuals in the Winston-Salem office, two in the Salisbury office, and five including myself that would be in the Charlotte office.

Q And how long have you worked for Mr. Watt?
A I have worked in this capacity since January of '93.

* * *

[*6] Q Now, we have been notified that you are an expected witness at the trial which is scheduled to take place sometime in November. Do you have any knowledge of what you are expected to testify about, the general area?
A I have worked enough years in the Mel Watt for Congress campaign, so I have been campaign manager and worked in terms of election process, trying to ensure that we have enough numbers to win the election.

* * *

[*7] Q You worked in that capacity as--were you a paid staff person in the campaign or just a volunteer or in what capacity?
A In '92 I was a paid staff person. In '94 I was a paid staff person. That is correct.
Q And in '98 also?
A In '98 also.
Q And in each instance you were the manager?
A I was the deputy manager in '92, the manager in '94, the manager in '98.

* * *

[*49] Q How about in terms of newspapers? What newspaper advertising were you doing in the '94 campaign and

what were you doing in the '98 campaign by way of comparison?
A In the '98 campaign we did use some newspapers. As a way to target voters we generally do not buy newspapers because we just don't think it is a good way to go out and make a direct appeal to voters. However, we did purchase some newspaper ads in some newspapers in the district.
Q Like *Charlotte Observer*?
[*50] A No. In Charlotte we used--*The Charlotte Post* was the newspaper that we used in Charlotte.
Q I think I know what *The Charlotte Post* is, but maybe you can fill that in for the record.
A It is primarily an African American newspaper.
Q How about in Greensboro? Did you have any newspaper you used there?
A In '98 Greensboro was not a part of---
Q (interposing) Oh, I'm sorry. How about in '94 in Greensboro? Was there any newspaper that you used predominantly then?
A I am pretty sure, to the best of my knowledge, we did advertise in *The Greensboro Chronicle*.
Q *The Greensboro Chronicle*; is that like *The Charlotte Post* basically?
A Yes.
Q Is there a similar publication in Winston-Salem?
A Yes.
Q And what is that, if I may ask?
A *The Chronicle*, I believe. I don't know. I cannot remember the name of the newspaper in Winston-Salem. But there is a similar African American newspaper in---

Q (interposing) And did you focus most of your advertising in that publication under those circumstances?
A Most of it, yes.

* * *

[*58] Q The '97 plan, would you say that was compact, geographically compact?
A Yes.
Q Is that even more compact than the '92 plan?
A To me; no.
Q It is less compact to you?
A To me.

* * *

[*58] Q Would you say that the '98 plan is more compact or less compact than the '97 plan?
[*59] A In my eyes?
Q Yes, sure.
A In my eyes I would say it is less.

* * *

[*67] Q Would you have any preference between Democratic precincts that were substantially composed of--or [*68] predominantly composed of African Americans or other Democratic precincts that were not predominantly composed of African Americans?

A My preference would be have highly Democratic performing precincts both in terms of how they vote and in terms of the number of votes.
Q Are there any more highly performing Democratic precincts in North Carolina that you are aware of than those that are predominantly African American?
A Most of the highest Democratic performing precincts are African Americans. I have a--there are precincts that produces more numbers for a candidate that are not as favored in terms of African Americans.

* * *

[*69] Q Are there any particular groups that try to rally behind you in organizing a campaign for--and you have represented a number of--well, let me put it this way. You have been a manager not only for African American candidates, but also for some white candidates, I believe you said. Was there any difference in the tactics that you used in the two situations?
A Difference in terms of tactics; campaigns are pretty much boilerplate things, I think. I think that you figure out what voters that you want to go ahead and target in and then you work to bring those voters home.
Q Was there a difference in the targeted voters with respect to the African American candidate?
A Not really; interestingly enough, not really. We have worked for many affiliated organizations. We have worked for women, senior citizens, African American, the Hispanic community. In the campaigns that I have been involved with

that is kind of the target groups that we were working towards, keeping them involved.

* * *

[*77] Q I may have asked you this earlier, but with your direct mail how do you select your targets?

A For direct mail that is in the campaign office or in the congressional office?

[*78] Q Well, let's say in the campaign office and then you can tell us to what extent the congressional office uses direct mail.

A Direct mail in the '98 campaign? Is that what we are talking about right now?

Q In the what?

A In the 1998 campaign?

Q That will be fine.

A We did polling to see exactly what the issues were that was on people's minds. We in turn developed mail towards target groups. Seniors was one of the target groups that we sent direct mail to. Women was a targeted direct mail. African Americans was a targeted direct mail. And we sent smaller mailers to other individual groups, organizations.

Q With respect to African Americans that you target, how do you get the information as to whether a person is African American or in some other category?

A In North Carolina that is part of their voting history. They have demographics on the voter profile in North Carolina so you can select whether you want white, male, or African American.

* * *

[*82] Q Are there some that you target with respect to race in your direct mailing without regard to party?

A I am not sure. Can you restate that one more time, please?

Q Do you have some direct mailouts--and I am not talking about five or ten; I am talking about sending several hundred---

A (interposing) Right.

Q ---where you are selecting those who the voter registration data identifies as being African American?

Mr. Cox: Object as to form.

A Do we send out direct mail to African Americans?

Q Right.

A Yes.

Q Selected as such?

Mr. Cox: Object as to form; answer if you can.

Q Let me try to clarify it--where you not sending it to [*83] whites; you are sending it only to African Americans?

A We have sent mail out that has been directly to the African American community, yes.

Q And in those instances the source of the list were the voting registration?

A The source of the list came from the voter registration, but we use a vendor that we request those voters to come from, yes.

[This page intentionally left blank.]

[*31] A Yes.

Q Now, let's talk about how that works. You have a map showing--it could be census blocks?

A Yes, sir.

Q It could be precincts?

A Yes, sir.

Q It could be counties?

A Yes.

Q A combination thereof?

A Yes.

Q And as you look at that, what statistics are displayed in the regular course of things? Are there any standard statistics that are displayed?

A The default in the system is to display the name of the unit on the screen, the name of the precinct, the number of the census block, the name of the county. And also there is maintained--although the window is small so you can't see all the statistics, there is a--the district that you are at that point assigning units to or removing units from, there is a long table, all of which isn't seen unless you scroll down, showing about 30 different components of that district at that point in time.

Q Can you recall what--recall as many of those components as you--as you do recall?

A Total population broken down by race, voting age [*32] population broken down by race, voter registration broken down by party and broken down by race, and election returns from three different elections. I believe that was the total list of items that you could scroll through.

Q So as you displayed that, you would have all of that information there before your eyes; is that correct?

A Well, you could, but it depends on whether you make--put that window on top. With the Windows technology, some of the windows are going to be on top and some of them on the bottom, so it all depends. Normally I didn't have that whole window open all the time because it made--you couldn't read half the map then.

Q If you had it only partly open, would the population data be there?

A Yes. That was at the top--the top of the scroll bar was total population.

Q And how about the racial data?

A That came next below it on that scroll bar. The beginning of the scroll bar was data gotten from the Census Bureau, and at the bottom of the scroll bar was data that we added to that system.

Q And that was what data that you added?

A Voter registration and election returns.

Q So the top part--you would have to scroll down in order to get that other data?

[*33] A Either that or put the window on top and expand it to show the whole window. There were two different ways to do it.

Q And if you did the latter, then it was very difficult to read, I believe you testified?

A Well, you could read that very well, but it suppressed about a third of the map so it was hard to see the map at that point.

Q I see. So was it your typical practice to use--to scroll down when you wanted all the information rather than to use the larger---

A (interposing) Well, if I wanted all the information, then I would leave the whole window open, but normally I would be looking at perhaps one or maybe two of the different components depending on what year I was at and for what purpose I was doing it.

Q And what were the components you would typically be looking at, or was there any typical data?

A Typically the main--the three things that were looked at were election returns, total population, and voting age population. I rarely looked at the voter registration information.

Q Did you look at the race?

A Yes.

Q Was that one of the things you regularly looked at?

[*34] A I think it really depended on which year and which--on which plan as to what I regularly looked at.

Q Can you describe that with respect to years and plans?

Ms. Smiley: I'm sorry. I am going to object. That is compound question. You are going to have to direct him--

Q (interposing) All right. Describe it with respect to years.

Ms. Smiley: You are going have to--that is still a compound question. You are going to have to direct him to a particular plan.

Q Can you clarify your--you said which year and which plan. What did you mean by that?

A Well, in the 1991 plan, which is the one that was rejected by the Justice Department, I believe that I looked at total voting age population and election returns. I believe that was true in '92 also.

In the 1997 plan in doing the 12th Congressional District, I looked almost exclusively at total population and election returns, in the 1st Congressional District at the total population, racial breakdowns, and election returns, not necessarily in that order.

In the 1998 plan--I am having trouble jumping around--

Q (interposing) Sure.

[*35] A ---because I have done the '98 plan most recently, so sometimes it is difficult for me to sort out in my memory the '98 from the '97, since much of this litigation is about not the latest thing I did. The '98 plan--I don't know which district we did, 12th--predominantly at the election returns in the 1998 plan.

Q And---

A (interposing) But all the various factors were looked at at one time or another, probably about every district to try to--we came down to the bottom line to see what the totals were on everything.

Q And with--you have indicated, I believe, in your last answer that with respect to the '97 plan, you looked at race as to the 1st District?

A Well, I also said that eventually I looked at everything. But in the 1997 plan, I looked at race to a greater extent in the 1st District than in the 12th District.

Q And why was that?

A Well, because the demographics were different in the east and the piedmont in terms of creating a district; the--there were just different areas of the state and different goals, different results, different voting patterns in different parts of the state. Issues like racial bloc voting, et cetera were different in different parts of the state, so my analyses were different depending on what I felt [*36] the important legal issues were to satisfy.

Q When you speak of racial bloc voting, are you referring to racial bloc voting by blacks and whites or by whites alone or by blacks alone?

A By both.

Q Okay. Well, let me ask you this. Isn't it true that in North Carolina 95 percent of the African Americans who register register as Democrats?

A I did some research in 1992 looking at the 30 or so counties that had their voter registration at that time cross-tabulated by party and race. And I found--and I think this was in our 1992 submission to the Justice Department--that in urban counties that had substantial minority populations that 95 percent of the blacks were registered Democrats, and in the rural counties with a substantial black population it was about 97 or 98 percent.

Q And was it also your belief that the African Americans voted cohesively in the same manner as they registered?

A Yes.

* * *

[*116] Q What does it mean? What do you understand functional compactness to mean?

A Well, I think the traditional means of measuring compactness have been the social science ones. I think we mentioned four or five. You mentioned two specific ones and I can't remember the names, P and N.

Q Dispersion compactness, perimeter---

A (interposing) Pildes--I can't remember the names of the scientists. But basically there are four or five different widely used factors that are basically purely mathematical based on compactness. But they don't really deal with any issues of demography, history, or other types of social sciences other than the application of a mathematical model.

I think functional compactness is compactness, not just the mathematics but looking at population, looking at where the population is, where it came from, looking at history, looking at settlements. In North Carolina you look at pattern of plantations and slavery, and there is a whole bunch of different factors that are not mathematical. So I think functional compactness is the nonmathematical component of compactness, larger word.

Q Is that the way you use compactness, sort of in line what you have explained as functional compactness?

A I think functional compactness would really be the [*117] nonmathematical parts of the word.

* * *

[*119] Q By the way, with respect to the functional compactness, is there any--how do you measure it? What are the measurements?

A Well, I don't know of any measure that you could do with a calculator of that. I think it is a component looking at issues of history, past history, whether it is history of the area, history of settlement patterns or racial segregation, history of transportation or history of past redistricting.

Again, I go back again to the Black Second, which you had raised first, as an issue where a district running from Vance to Jones County, basically all three configurations are basically Vance to Jones with a number of variants that--I [*120] don't know what that district would come up with in the mathematical formulas, but I think it was widely viewed as one that was fair and put together a compact population of those with like interests in the northeastern part of the state for 30 years.

* * *

[*121] Q Well, how do you--I am just trying to tie down how do you determine whether something is functionally compact.

A The totality of the circumstances.

* * *

Q Well, you mentioned history and the history of the Black Second. Isn't it also relevant that for two centuries the

legislature never combined Mecklenburg County with either Guilford or Forsyth County?

Ms. Smiley: Object to the form of the question; if you can answer that--relevant to whom?

[*122] Q Relative to functional compactness.

A Well, remember in the three plans prior to 1792 they were combined. So I mean, I think that is relevant also, but I think certainly that would be a factor deciding the totality of the circumstances. Yes.

Q And as to the totality of the circumstances, wouldn't it also be a factor in that Mecklenburg County is in one metropolitan statistical area and that Guilford and Forsyth are in a different one?

A Well, I think--the current term, I think, is metropolitan statistical area. I think they dropped the word "standard"---

Q (interposing) Yeah.

A ---but the---

Q (interposing) I am old fashioned.

A That is okay. It is hard to remember the changes in terminology. That is a census department test that usually deals with a central city or urban area and its urban suburbs, and I am not sure how exactly they define these, but Charlotte and I think it is--I think it includes two counties in South Carolina which are not and have never been congressionally redistricted together with Mecklenburg County.

Q Quite true. But still given the circumstance that the Census Bureau uses this terminology, isn't it significant in [*123] determining functional compactness that Charlotte is

in one MSA, if I may use that abbreviation, and Guilford--I mean and Greensboro and Winston are in a different MSA?

Ms. Smiley: I will object to the form of the question. You are attempting to without identifying what is significant to put words into Mr. Cohen's mouth. If you can answer the question, Mr. Cohen, go ahead.

A I certainly think it has some significance.

* * *

[*123] Q Are you familiar with circulation areas, newspaper circulation areas, that term?

A It is the area where they deliver their paper.

Q Yeah; okay. Would you think it significant in determining functional compactness that there is nobody in Mecklenburg County who subscribes to the Winston-Salem newspaper?

A I bet there is a bunch of students at UNC Charlotte who are from Forsyth County that subscribe to it.

Q Have you looked at--do you mean subscribe to it in Forsyth County?

A I know that when I was in college most college students subscribed to their hometown paper if they were [*124] away. But if you are talking about--you know, so I am sure that there are some subscriptions in Charlotte to *The Winston-Salem Journal*. It is probably largely students at school in Charlotte plus libraries.

Q And you would think there was some subscription to the Greensboro newspaper by the same token?

A Yeah. I mean, you asked if there are some.

Q Yeah.

A Maybe, you know, a couple of hundred.

Q Have you by any chance looked at the table provided by one of the defendants' experts--I forget which one--that had the circulation and as I recall indicated zero, zero for the Winston-Salem and Greensboro papers down in Charlotte?

A I have not, though I don't believe it zero. I think they may be confusing mail circulation with carrier delivery. I don't think it is zero mail delivery.

Q Well, certainly wouldn't it be relevant to functional compactness how much the newspapers of one community are read in other communities in the same district?

A I am sure that that would have some relevance to all the factors; yes.

Q And if I told you that DMA is a television term referring basically to market area, wouldn't it be significant that the DMA, the market area, for the Charlotte TV stations is different from the market area for the [*125] stations in the Triad, namely Greensboro, High Point and Winston-Salem?

Ms. Smiley: Object to the form of the question and characterization of significant. If you can answer the question, go ahead.

A I am sure that they are different.

Q They are different. I can assure you of that, too. But isn't that relevant to functional compactness or lack of functional compactness?

A Well, I think that also that one of the things that this--when you are looking, for instance, at the minority population, there is also a number of newspapers in circulation in the

minority community that are not based on the community where they live.

I know there is--I think there is one or two newspapers in the black community that circulate over the entire state, so I am not sure whether--I don't believe that any one sole source of information on television is network television anymore, nor do I believe that everyone's sole source of newspaper information is simply the daily newspaper anymore. I think that things are changing and have changed substantially.

Q And with respect to television, there is change to cable, a lot of use of cable; correct?

A Yeah. I mean, I think things are fragmenting rapidly.

[*126] Q Yeah, but they are fragmenting around particular geographic areas; isn't that true?

A Smaller and smaller areas.

Q And isn't it true that the cable access channel on a cable system in Charlotte would have nothing from Winston-Salem or Greensboro?

A It would certainly be very unlikely, although I know they invite people in to produce stuff and will carry stuff from other systems, so I don't really know the specific content of the public access channel in Charlotte.

Q Now, with respect to functional compactness, you referred to newspapers published by African Americans and designed for African American readership predominantly; is that correct? You made some reference to that a moment or two ago?

A Yes.

Q What is the relationship between race and functional compactness?

A I think that the significance comes under Section 2 and Section 5 in the *Gingles* case, where if you look at is there a compact--is the minority community compact. So I think it becomes relevant to look at the minority community as opposed to the entire community because I think that is one of the tests of *Gingles*. *Gingles* doesn't ask whether the district is compact. It asks whether the minority population **[*127]** is compact, so I think that becomes relevant then. Yes, sir.

Q It asks whether it is geographically compact, doesn't it?

A Yes.

Q Now, is the fact that a person lives--a black person lives in Charlotte significant in determining the functional compactness of that black person with an African American who lives in Greensboro?

A I believe that there was some expert testimony submitted in the 1992 trial that in fact the settlement patters in the urban area post-slavery were that the settlement patterns from Greensboro to Charlotte were largely determined by railroad structure and industrialization along the line with people moving from one city to another still within racially segregated communities and in fact historically there were links given manufacturing, transportation, and dispersion of slave populations that linked together those communities in the piedmont crescent.

Q All right; but now let's look at center city Charlotte, then, with that in mind. You have a white citizen who lives in, one part of central city Charlotte and you have an African American who lives ten blocks away.

A Uh-huh.

Q Does race have anything to do with their functional compactness?

[*128] A Well, I think historically it is more likely that the ancestors of the black--of that black citizen came via the North Carolina Railroad. Perhaps their ancestors lived in Greensboro or Thomasville or whatever after coming off a plantation as opposed to the white person probably coming from New York. So I think, yes, there is a substantial distinction historically.

Q So historically, but you say that relates to functional compactness---

A (interposing) Yes.

Q ---as of the present time?

A Yes.

Q And therefore if the white is put in one district and the black is put in another, that makes sense because they are not functionally compact; is that---

A (interposing) I wouldn't say it makes--necessarily makes sense. I said that in fact that the issue of compactness in the population is that there may be more commonality of interest between a black person in Charlotte and one in--and one in Greensboro and one in Winston-Salem or one in Greensboro and Charlotte in terms of family ties than there may be between two white persons, one of whom came from New York and the other came from Ohio.

Q And with respect to Charlotte, staying in Charlotte, isn't it true that Sue Myrick, who is a member of Congress **[*129]** from one district, lives only a few doors away from Melvin Watt, who is a congressman from another one?

A Yes; I believe they live in the same census block, in fact.

Q Same census block?

A Yes.

Q And census block is fairly limited; is that correct?

A It would in the context of Charlotte normally be a city block.

Q But in the--there are in the same block, though, basically?

A Yes.

Q How functionally compact are they?

A Well, Ms. Myrick decided to run in a congressional district that she didn't live in. I mean, that was her decision. I am not sure if that has anything to do with--the U. S. Constitution doesn't require you to live within your congressional district in order to run, so I am not sure of the relevance of Ms. Myrick and compactness when she chose to live in a district she didn't run in, or I think I said that backwards.

Q I am asking in the context of race as it relates to functional compactness are Sue Myrick and Melvin Watt functionally compact because they live in the same district or does geography have anything to do with it?

[*130] A Well, I think they probably are unusual in that--in much of North Carolina that they live in an integrated census block, which is not probably the norm in North Carolina.

Q And in drawing the 1992 plan, isn't it true that you went block by block and had blocks that were heavily African American put in with the 12th District and the 1st District and

nearby blocks, census blocks, which were predominantly white which you put in either the 1st or the 12th in---

A (interposing) Which year's plan were you asking about?

Q 1992.

A Well, we started in 1992 with using precincts, not census blocks, as I already testified. But in the 1992 plan, yes, in that plan there was a lot of--when it got down to the very bottom level of assignments being made looking at the race predominantly. Yes.

* * *

[*145] Q All right. Are you aware of any statement by anyone at the--did you have any conversation with anybody in the Civil Rights Division?

A In 1996, I don't think so.

Q How about in 1997?

A Yes.

Q What, if anything, did they--and during what periods of time did those--well, how many communications did you have and over what period of time?

A I would have had discussions with people in the Justice Department during the time of putting together the Section 5 submittal in 1997 and during their review process. I don't remember what months they were in '97.

Q Did you have any discussions with them at the time that you were actually preparing the plan?

A No.

Q Did you in any way seek to ask them whether they would approve anything less than a majority black district in the northeastern part of North Carolina?

A They don't give advisory opinions.

Q So---

A (interposing) The answer is no, I did not.

Q So you had to rely on whatever information you had apart from any advisory opinion on their part?

[*146] A Yes.

Q And then when you prepared the Section 5 submission, did you direct that towards assuring that they would recognize that the 1st District was majority black and would thereby be inclined to approve it?

A My duties in putting together a Section 5 submittal was essentially to be an advocate for the State in helping show that the plan met the requirements of Section 5, so I would have assisted or put together arguments designed to show that it met Section 5 based on what we thought the Justice Department thought it meant.

Q And in doing that, did you proceed on the assumption that the Justice Department thought that it meant that there had to be a majority black district in northeastern North Carolina?

A I felt that Section 5 would require it so that was what--and Section 2 in the *Gingles* case, so that was basically what we were putting forward. I don't remember exactly what I said or what the language of the submission was.

Q So that was your belief from 1996 right on through to the time you submitted the Section 5 preclearance documents in the spring---

A (interposing) Yes, sir.

* * *

[*151] Mr. Everett: I would like for him to explain why he views the--I believe he did indicate he viewed the 12th District in the 1997 plan as being more compact, not geographically compact, but compact functionally---

The Witness: (interposing) There is not just one---

Mr. Everett: ---than the earlier one.

The Witness: There is not just one compact 12th District that you can create. I think that just as there is functional compactness between urban populations in Guilford County with those in Mecklenburg County, there is also some functional compactness between people in one part of Davidson and another and one part of Rowan and another. It is a balancing test and there are many different options the legislature can choose from that are constitutional. The legislature chooses which ones it wants to go down.

So I think that both--both the areas in Davidson relate to each other, Rowan, relate to functional compactness just like Guilford versus Mecklenburg, so I think the answer is both to your question, not exclusively one or the other.

Q So you could do it either way but one winds up with what, 47 percent black and the other around 40 percent?

A Yes, sir.

Q Now, are you aware why the choice was made to be 47 **[*152]** percent black instead of 40 percent?

Ms. Smiley: Object to the form of the question. If you can answer that--I think you are assuming facts not in evidence.

A I think the choice is whether to create a district that a Democrat was capable to be elected in because the key issue here in creating the district in 1997 was really to create a district--an urban district in the Piedmont where a Democrat could best be elected and also the same thing as reelecting the incumbent.

And I think the issue was Greensboro being in the district as compared with more rural areas of Davidson or Rowan County that the result was more--was a more Democratic district. So I think the cause and effect is the district is more Democratic and it is also more black, not the other way around, that there was not any goal to have 47 percent and then the boundaries of the district followed that.

Q Now, with respect to the 19--well, with respect to the Exhibit 1 plan and the plan that was adopted in 1998---

A (interposing) Yes, sir.

Q Isn't there a similarity in that Guilford County was not in either one of those?

A Yes, that is similar.

Q And in that one--didn't you testified earlier that Congressman Watt won in the general election?

[*153] A Yes, he did.

Q And he won--you are not--you are not aware of what majority he won by, but he did win?

A I remember it was a smaller majority in 1998 than it was in 1996. That is my recollection.

Q Yeah. And wouldn't you have expected a smaller majority if there were a reduction of the African American population from the mid 50s to the--to 47 percent?

A I expected a reduction because the number of Democratic voters was far less.

Q And also--well, let me put it this way. Couldn't you state it just as readily by saying you expected because the number of blacks was far less?

A Well, you asked me earlier wasn't it true that 95 percent of the blacks were registered and voted Democratic. I answered that yes. And I think that the analysis of Democratic vote and black population are very close to being the same questions and answers.

Q So you could word it either way; right?

A It could be worded the same way, but my answer was the intent was to deal with the Democratic, not the race.

* * *

[*158] Q Is it your understanding that under *Shaw v. Reno* and the later cases race has to be a predominant motive as a basis for any sort of strict scrutiny?

A That is my understanding of the cases.

Q If race isn't a predominant motive, then *Shaw v. Reno* doesn't apply?

A I don't believe it applies.

Q Now, let me ask you this. With respect to the 1992 plan, if the North Carolina General Assembly had simply reenacted it and said, "We are doing"--"We are doing this for political reasons and not for race; race is not the predominant motive," would it be your interpretation then that *Shaw v. Reno* would not apply?

Ms. Smiley: Object to the form of the question; if you can answer that.

A You mean that *Shaw v. Reno* wouldn't apply because we said it wasn't the predominant factor?

Q No.

A I mean I think it is a question for the court to decide.

Q Okay.

A I don't think just because we say something means it is so.

[*159] Q And if the court believed that you were doing it now for a political reason, *Shaw v. Reno* wouldn't apply?

A Well, the case would apply, but the holding of the case would not require it to be held unconstitutional if the court felt that politics was the predominant factor.

Q So would it true that in any situation where it is stated by the legislature that politics is the predominant motive and if the court believes that, then no matter what the racial configuration is there should be--there should be no application of *Shaw v. Reno*?

A I don't know if I really analyzed the case to that extent to answer your question, so I don't know.

Q Well, do you see any reason why that wouldn't yield an affirmative answer just thinking about it?

Ms. Smiley: I am going to object to the form of the question.

A Could you ask it again, please?

Q Okay. My question is--and I realize you haven't had an attempt--haven't had a long chance to analyze it, but wouldn't it be true that if the legislature says that political motivation is predominant and if a court agreed, accepted that, that then no

matter what the racial pattern or configuration was, there would be no basis for applying *Shaw v. Reno*?

Ms. Smiley: Object to the form of the question. [*160] Answer if you can.

A From what I know of reading the majority opinions in the *Shaw* cases, the answer would be that it would not apply.

Q Now---

A (interposing) I didn't want to get it backwards.

Q And given that circumstance and given that in North Carolina 95 percent of the African Americans are--or at least 95 percent are registered to vote as Democrat, doesn't that mean that if the legislature says "We moved 300,000 African Americans into this district because they were Democrats" that then *Shaw v. Reno* would not apply?

Ms. Smiley: Object to the form of the question. Answer if you can.

A I don't think it necessarily is just because we said it is.

Q Well, let's say if they believed it.

A Yes.

Q So doesn't that mean that if the legislative leaders can put their legislators in a frame of mind to say and believe that "We are doing this for politics," there is no basis for applying *Shaw v. Reno*?

Ms. Smiley: Object to the form of the question. You can answer if you can.

A If race is not the predominant factor--whatever predominant means, if it is not the predominant factor, then [*161] I don't think *Shaw* applies. If politics is the sole factor, then race is certainly not the predominant factor.

Q So that if the--if you have a situation where you--which you have in North Carolina, where there is almost an identity between--well, let me put it this way--where almost every African American who registers to vote and votes--registers to vote and votes as a Democrat, doesn't this mean that by simply referring to them as Democrats you have eliminated the effect of *Shaw v. Reno*?

Ms. Smiley: Object to the form of the question. I believe the *Bush v. Vera* answered that question. Gerry, if you want to try and respond.

A I think I have already testified today that the genesis of--and this relates to your question--the genesis of going to this configuration of the 12th District rather than the 1991 plan came from a political understanding of Mr. Balmer's plans to the Justice Department that creating a district--a predominantly Democratic district in the urban piedmont would add a Democratic seat as opposed to a Republican one, and that was the genesis for that decision, not race at all.

Q So that actually the 1st District in the--I mean, pardon me, the 12th District in the 1992 plan was politically motivated predominantly rather than racially?

A I think it was--I think it was predominantly **[*162]** politically motivated.

Q And therefore the district should not have been held unconstitutional; is that correct?

A Well, the court didn't--obviously the court did not feel that that was the case, that politics was predominant.

Q But if they had thought that it was predominant, even though it yielded the configuration that it did, they should have allowed the district to be--to continue---

Ms. Smiley: (interposing) Object to the form of the question.

Q ---as it exists in the 1992 plan?

A If the holding of--I think the holding had to do with the shape triggering the analysis and then belying the allegations of motive. The court gave it special scrutiny and then did not believe the state's case in point.

* * *

[*167] Q Now, in the 1997 plan the 12th District has less than majority black, if I recall; is that correct?

A Yes.

Q Was it your opinion at the time, and I hope I am not **[*168]** repeating the question, that because of that circumstance *Shaw v. Reno* did not apply?

A Well, I think all cases always apply to---

Q (interposing) I'm sorry?

A I think the case of *Shaw v. Reno* certainly applies, but I am not sure what your question is.

Q Okay. My question is whether a less than majority minority district is subject to any sort of strict scrutiny.

A I have never really had any opinion on that question.

Q Then let me ask you this. In connection with the 12th District as it exists there, if a court should find a predominantly racial motive for drawing that district, do you believe it would then be able to meet strict scrutiny?

Ms. Smiley: Object to the form of the question. Answer if you can.

Q Do you have any opinion on that?

A If the court found that race was a predominant reason with strict scrutiny; well, it is hard for me to answer since my contention is that politics was the most predominant factor. So if race was the most predominant factor, and if the court--if the court found that race was the most predominant factor and that *Shaw* applies even if the district is not majority black, then it is my opinion that the strict scrutiny rule would have to be applied.

Q All right.

[*169] A And then I need to figure out whether--then the answer--now I think I phrased the question.

Q All right.

A The question you have now asked me is based on all of that---

Q All right. Based on all that, do you think it would meet the test of strict scrutiny?

Ms. Smiley: Object to the form of the question. Answer if you can.

A I don't have any opinion on that.

Q Well, politics would certainly not be a compelling government interest as you understand it, would it?

A Sure I think politics is a compelling government interest.

Q So you do think it would be a compelling government interest--politics?

A Yes.

Q How about incumbent protection? Would that be a compelling government interest?

A Okay; the question is compelling. I think to meet the compelling test, you have to look at all the factors together to

determine whether you have met this compelling test. I am not sure--it depends on what the--it depends on how important the factors were in a particular case by case basis. I don't think in the abstract you know whether the court is going to **[*170]** find something compelling unless you know--you know, were there two incumbents that live in the same area, were there--you know, were you are trying to keep the same state's division of members in Congress based on the politics. I think it would depend on what the facts were.

Q So you think that that type of wording keeping incumbents in the same--having them in the same district would constitute or could constitute a compelling government interest?

A Along with other factors, it could meet--help meet that test. I don't know if on its own--if that was the only factor I think it probably would not be a compelling state interest, but I think it would be relevant in determining the whole set of factors and would be important.

Q Can you give us some other factors that might be dialed into the equation?

Ms. Smiley: Object to the form of the question.

Q Or that might be considered; I will rephrase it.

Ms. Smiley: I still object to the form of the question.

A Partisan balance, preserving the core of existing districts, putting members together, complying with Section 2 if the *Gingles* factors are met; I think there is--those are all things that could be considered. I think I mentioned incumbents.

[*171] Q Okay. Complying with the *Gingles* factors, would that have any relevance to the creation of this 12th District in the 1997 plan?

Ms. Smiley: Object to the form of the question. You may answer if you can.

A I don't know. I don't have any opinion on that.

Q You don't have an opinion one way or another? Okay. You referred to something about a core?

A Yes.

Q What do you mean by that reference?

A If you have an existing district, then one governmental interest I think is allowing a new district to resemble to some extent the prior one.

Q When the 1991 plan was drawn, did the legislature make any effort to retain the core of the districts from the 1990 plan---

A (interposing) Yes.

Q ---or 1980 plan I should say.

A Yes.

Q And in drawing the 1992 plan, was there an effort made to retain the core of the 1991 plan?

Ms. Smiley: Objection. He has already answered that question.

A I have already answered that we completely changed the configuration of the 12th and basically started afresh so [*172] that--there was no core of an existing 12th District because we didn't have 12 districts for 30 years before that, so it is really had to answer that question in a meaningful way; the remaining 11 districts, yes.

Q Now, with respect to the 1997 12th District in comparison with the 1992 12th District, was there an effort to maintain a core?

A Yes.

Q And can you describe how that effort was carried out?

A Well, as we looked at the previous 12th District and at the *Shaw* decisions in validating that district, that in continuing to try to construct a district that was--would elect a Democratic member of Congress we looked at the precincts first that had been in the 12th District that had been invalidated because most of them were overwhelmingly Democratic.

And in putting together the 12th District, we looked at the election returns of all those precincts as our predominant factor in constructing the 12th, so in that--the core of the district was kept because it was a district that had elected a Democratic congressman in 1992. Ergo, some of those factors were already there.

Q Elected an African American as an incumbent; correct?

A Yes.

Q And wasn't a substantial amount of the vote for that [*173] African American given by persons who were African Americans?

Ms. Smiley: Object to the form of the question. You can answer if you can to the characterization "substantial."

A A substantial amount of the votes that Harvey Gantt received, were they from blacks? I have never analyzed it in that context whether looking at whether--I have never looked to see whether a majority of the votes that Gantt got--excuse me, that Watt got were from blacks, so I wouldn't have any

opinion of that. It would probably be an easy thing to figure out, but I have never looked at that.

Q So you do not deny that a substantial--we will put it this way. Would it be your belief that a substantial number of the votes that he received was from African Americans?

A Yes.

Ms. Smiley: Object to the form of the question.

Q Now, did you consider Charlotte as a hub for drawing the 12th District after the--in the 1997 plan after the invalidating of the 12th District in the earlier plan?

A Yes.

Q So Charlotte was a sort of beginning point; correct?

A Yes.

Q In connection with the--in connection with the old 12th District that was invalidated, who and when was the decision made to take Durham out of it?

[*174] A Did you say who and when?

Q Yeah. Who made it? I'm sorry. That is a very poorly phrased question. When was it made--when was the decision made and by whom to take Durham out of the 12th District?

A Well, I worked as committee counsel and my primary responsibility in our management structure is to report to the chairman of the committee, who was Senator Roy Cooper. And I am sure that one of my first instructions was to remove Durham from the district to meet the constitutional infirmity. Since Mecklenburg was to be the hub, that had to be the conclusion.

Q And how about Gastonia, which is fairly close to Mecklenburg? How about the decision to take that out, when made and by whom?

A I think the same context looking at the appearance issue since the court had focused on that--that an appearance could trigger something--that removing Gaston County removed something that--I think from a reading of the court that that was another thing that was felt to be objectionable in trying to meet Justice O'Connor's concerns.

Q In the goals that are stated when this process began wasn't it stated there would be an effort to avoid splitting of counties?

A I don't remember.

Q Okay. Well, let me ask this, then. Did you consider [*175] in drawing the 1997 plan which was enacted that all of the counties of the proposed 12th District would be split?

A I think that--yes, that we certainly looked at the issue of that, but then felt that by dividing counties a district that was more Democrat could be created since the---

Q (interposing) And by dividing--I'm sorry.

Ms. Smiley: Please let him finish his question.

A ---since the areas that were not included in those counties were predominantly Republican.

Q And were also predominantly white?

A That is also the case. Yes.

Q Do you recall in any instances areas being excluded which were in fact predominantly Democratic?

A What appeared on my screen while I was doing the redistricting for each precinct was--election returns is what I would have had on my screen. In some cases, we might have taken a precinct that was slightly less Democratic as opposed to more because the district had to be contiguous and it also had to have the right population.

Sometimes you would want to do "A" but the population didn't work, so you had to switch out a precinct to make the population tolerance fall within it, and I might have probably wound up taking something that was slightly less desirable from the partisan viewpoint in order to meet the population criteria since we had so many different criteria **[*176]** to juggle.

Q Now, in this process of getting the voting results, were the voting results something that you scrolled up? I believe you indicated certain voting results were near the bottom and you could scroll them up?

A Well, you could do that. Actually, I answered an earlier question that the default on the screen was to show the name of the unit. You could also choose to put something else, so that while the default might have been to say Charlotte Number 1, in fact when I was doing this what I showed on the screen instead of the name of the precinct was one or several of the election returns with that precinct rather than the name of the precinct, so it was there right in front of me. It was also up in the corner there with that other map with the other window.

Q Were you aware at the time that some of the precincts that had the heaviest Democratic voting results were African American---

A (interposing) Yes.

* * *

[*186] Q Do you know whether there was a much higher percentage of African Americans who were retained in the

12th District as between the 1992 and the 1997 than the percentage of whites?

A I do not know the answer to that question.

Q Do you know conversely whether of those who were moved into the 19--into the 12th District from other districts as shown in the '92 plan whether the number of whites that was moved in from other districts was greater than the number of African Americans moved in?

A Well, since the district dropped from 54 to 47 percent black, the answer would have to be yes.

Q Pardon me?

A Without knowing anything else, since the district dropped from 54 to 47---

Q (interposing) You don't know to what extent the formation of the district involved movement of whites as compared with blacks to get that number?

A I would accept that since the percentage of blacks dropped by 7 percent, then more whites must have been moved in than blacks.

[*187] Q But isn't it true the blacks who were there were the ones who had already been there for the most part?

* * *

[*187] A Well, I don't know because since all of Greensboro--I'm sorry--Orange, Durham, Alamance, Gaston were dropped out. I wouldn't think that it is most, but I have never done any statistics to know what the percentage is.

[*188] Q Do you have any idea to what extent whites who had been in the earlier district--that is, the 1992 version of the

12th District--were still in the 1997 version of the 12th District?

A Well, obviously those in Alamance, Orange, Durham, eastern Guilford, and Gaston were obviously no longer there.

Q And where did they--where did they make up the difference in that regard?

A Mecklenburg County. More of--when the eastern and western ends of the district were eliminated, the remaining district had more population in each of the remaining six counties than in the prior one, although it is possible that in Iredell County it was the same configuration of precincts. I am not sure. But the other counties all had more population in the 1997 12th District than they did in 1992.

* * *

[*194] Q Now, with respect to the formation of this district, the one that ultimately was--redrawing this district, the one that ultimately was enacted into law, can you explain your role in the drawing of that district?

[*195] A Yes.

Q And what was that role?

A To create a district that would elect a Democrat that had the proper population.

Q That had what?

A That had the proper population, that one-twelfth of the state's population, that would elect a Democrat, that included the residence of Congressman Watt, and that took the most Democratic precincts in order to do that.

* * *

[*195] Q Have you heard the term "racial fairness" anywhere along the line in your work on these---

A (interposing) I have heard that word at some point; I am not sure in the context of this district or this plan.

Q Do you have any idea what that term might mean?

A Well, it could be a euphemism for proportionality. It could be a euphemism for one of any number of factors; giving an opportunity for candidates to elect--voters to elect a candidate of their choice, which would be a requirement of the Voting Rights Act.

Q When you say euphemism for proportionality, can you explain what you mean by that?

[*196] A You went back to talk to Mr. Dunn's comments in 1991, for instance, where I think he was using those as synonymous terms.

* * *

[*201] Q ---about the 12th. At the bottom of the 12th District right near the South Carolina line, is there an area that is in a different district, I believe in the 9th district?

[*202] A If you are talking about part of Precinct 77, Charlotte Precinct 77 is divided between the 12th and 9th, I believe.

Q And had it not been divided in that manner, as shown on the map of the district--I mean, the map of the redistricting plan--the 9th district would not have been contiguous; is that true?

A Assuming the rest of the 12th was the same way it was, yes; that is correct.

Q And so this provided a bridge between the two, the east and the west parts of the 9th District?

A That is correct.

Q The 77th--Precinct 77 was primarily African American, wasn't it?

A Yes.

Q And indeed isn't it true the portion that is in the 9th District--the portion of Precinct 77 in the 9th District had either one person or no persons at the time?

A It had one person in the 1991 census, but she has since died and there is actually nobody there now. It is the Westinghouse Industrial Park.

* * *

[*205] Q All right. Now, in a floor debate, and I believe this is Senator Cooper speaking, he speaks--he says, "We have preserved the current partisan nature of each of the districts." Does that mean, then, that in drawing the 12th District that it was intended to retain the partisan nature of the 12th District in the 1992 plan, i.e., '97 and '92 were both designed to have the same partisan nature?

A Yes.

Q Is that what he is referring to?

A Yes.

Q And he also says that the Senate plan, which was the precursor to the eventually adopted 1997 plan--here is his passage–"uses as a foundation the basic core of the existing

congressional districts. No district is dramatically changed, and most of the districts, if not all of the districts, have become more compact." Is that a correct statement in your view?

Ms. Smiley: Object to the form of the question. You can answer that if you can.

A Certainly from a mathematical basis they are all substantially more compact. That was the first part of that question? I'm sorry. I wasn't listening to the second part.

Q The first part says the Senate plan ultimately adopted as a practical---

A (interposing) No radical change.

[*206] Q No radical change, yeah, that "It uses as a foundation the basic core of the existing congressional districts." Would you agree with that?

A Yes. I think I already stated that earlier in my testimony today.

Q And he says, "No district is dramatically changed."

A Well, I mean, I think in fact that the 1st and 12th Districts were dramatically changed. I think that removing the area from Guilford to Durham County, the narrow corridor west of Gastonia, and the part of the 1st District that ran all the way almost to the South Carolina border--I would think they were dramatic changes, but you just stated the floor speech from the introducer.

Q And when Senator Cooper says, "What we tried to do was to make each district more geographically compact, leaving the core area for each of the present districts," insofar as he was referring to the core area for the 12th District he would be referring to the six counties shown on the map as part of the 12th District?

A It lopped off three counties on the east and one on the west and the one--the six in the middle were the core. Yes.

Q And so you are saying the same--you say the same thing with respect to the 1st District, the lopping off of the counties on the southern end?

[*207] A And I think there were maybe seven or eight counties removed, parts of.

Q Do you have any recollection as to the number of people in the noncore district that was lopped off of the 1st District?

A The number of people who were in the 1st District under the 1992 plan that were not in there in 1997?

Q Were lopped off.

A I think that in one of our submissions or maybe the prior litigation that question was asked and answered, but I don't remember the answer. It was some substantial number of people, though. I recall hearing that question and seeing the answer at some point in the past. I don't know the

* * *

[*243] A I don't know the connection to anything, but I know that one of the--one of the instructions that Senator Cooper gave me was to try to divide a fewer number--a substantially [*244] fewer number of counties that had been divided in the 1992 plan. I don't know if there was any connection between this article and survey and that instruction. I would have no way of knowing.

Q Did he tell you anything about minority representation?

A I don't understand that question. It is pretty broad.

Q Did he suggest to you at any point that it was very important to assure minority representation of the congressional delegation?

A I think our conversations indicated to me that he thought that the Voting Rights Act would require the creation of a minority district in the northeast given the *Gingles* case. I don't know if he used the word importance of minority representation in those instructions.

Q Did he refer to that in the context of the 12th District at all?

A No. He did not tell me that we should create a district that was majority black in the 12th District because that had already been ruled unconstitutional.

Q Did he tell you that it should be as substantial number as possible, up to 40--up to 50 percent?

A No.

Q Did he suggest to you anything with respect to the plans that you initially drew which--the Cooper/Winner plans, [*245] which had only 39 percent?

A He told me--the only comments on that was the--in the context of that looking at the Democratic-Republican statistics that some of those other plans were not heavily enough Democrat to ensure the election of a Democrat. And he told me a couple of times that Congressman Watt was concerned about that issue, that he did not feel that under--Senator Cooper told me that--did I say Senator Watt--Congressman Watt was concerned that some of those earlier plans you mentioned in Exhibits 1 through 4 or so that he would have trouble getting elected in that district.

Q And would that trouble be related to the absence of enough Democrats in the district or the absence of enough African Americans in the district?

A I was not told the origin or nature of the comments, just that he felt that he did not like that district and those proposals.

* * *

[*254] Q Yes. Let's start with Guilford.

A Two things: one, I think in doing the 12th Congressional District--I earlier testified we relied on election returns in our analysis. I think to a large extent--I don't know if I was using--I think I was probably using the Gantt-Helms race equally with probably the Rand-Gardner race so I am not sure if the same things would have shown up with that other race.

But I do remember discussing in Guilford County the--there are a number of precincts that appear to meet that criteria in central and western Greensboro that are not in the 12th District.

One of the things we looked at--I believe that in fact as we came down to the end, there were a number of precincts [*255] that I had put in that district, but that required removing precincts either that were more favorable in Mecklenburg County or removing precincts in between Mecklenburg and Guilford County that would have left it either point contiguity or in many cases just one precinct instead of two.

So in trying to balance the factors, I remember discussions with Senator Cooper and my own analysis that that factor had--that decision had to fail because it would either

make it worse on the other end in Mecklenburg County where there was more crossover voting than in Guilford or make the district so narrow that we ran--would run into the wrath of Justice O'Connor on the issue of shape. So that would be my answer in Guilford County.

Q How about Forsyth?

A Forsyth County, the reason those precincts were left out were very specific. Representative Burr lived in the west side of Winston-Salem. Those particular precincts were the precincts between his home precinct and the dividing line we wound up with. And we felt that taking those precincts, the ones right up to Representative Burr's home precinct, might be seen as unacceptable. I am talking about formulating the Democratic plan, not necessarily the compromise.

That would be unacceptable because Representative Burr would see more of his hometown taken, thus making him [*256] potentially threatened by a primary opponent in another part of the district. So we tried to leave as much of Winston-Salem with--in the 5th District in conjunction with all the other criteria. So those precincts were in between the boundary that we eventually drew and Representative Burr's home precinct.

Q And Burr is Republican?

A Yes.

Q And so you think that--you concluded that Burr would rather have these Democratic leaning precincts in his district? Is that it?

A We viewed them as his hometown precincts---

Q (interposing) All right.

A ---as opposed to Democratic precincts, that he would prefer those. Again, what you see in this particular shading is

the votes for Gantt that would have included a number of nominal Republicans who may have in many urban areas voted against Helms and for Gantt. And in a white on white congressional race that Representative Burr would be likely to face in the 5th District, the Gantt-Helms returns probably would not be as relevant to him as some other analysis like the Gardner-Rand analysis.

Q So you are not sure what the Gardner-Rand analysis would show one way or the other?

A No. I mean, at the time I remember looking at it on [*257] the screen, but I don't recall what it was.

Q Now what about down in Mecklenburg? Were there--are there any along the way that you see where there are---

A (interposing) The 50 and over?

Q Yeah, that is in---

A (interposing) No, nothing--nothing until you get to Mecklenburg County.

Q Then what about in Mecklenburg County?

A Well, we faced the same thing again in Mecklenburg County that we did back in Guilford, which is if you took more of Mecklenburg there is a number in the--two factors. One is looking at Gantt-Helms statistics in Mecklenburg County is a bit distorted because that was Gantt's home county.

So I think that looking at that as some prognosticator of Democrat-Republican races for Congress in general was not really the best factor because a lot of that was voting for the hometown candidate, Gantt, against the incumbent senator from Monroe or Raleigh, depending on how you look at him. And so I think that those were actually artificially inflated numbers.

But even if they weren't, I go back to the same analysis in Guilford. If you took more precincts in Guilford County since the population had to be equal you would have had to remove them either in the middle or at the end in [*258] Greensboro, so I think either of those were unacceptable. We were trying to strike a balance between making the district the most Democratic as possible and not having the same kind of shape that Justice O'Connor found so objectionable in *Shaw v. Reno*.

Q And yet you knew that by adding in Forsyth County and in Mecklenburg you would be able to come up with a district which would be more compact and would not include Guilford; isn't that true?

A Are you saying if we chopped Guilford off it would be more compact?

Q Isn't that true? If you were to---

A (interposing) In a mathematical analysis, yes; I think I answered that earlier.

Q All right. And if you added the Democratic leaning precincts that were adjacent you wouldn't have to extend the district as far, would you?

A The district would be less Democratic--if you removed Guilford County and replaced it with any combination of precincts in Forsyth and Mecklenburg County, the district would be less Democratic than the one we enacted in 1997, which was our primary concern.

* * *

[*291] Q Then on Monday, February 10th in the evening there is one to you with a copy to Leslie Winner---

A (interposing) From me.

Q From you, from you to them, "Subject: 97 Cooper 3.0."

A Uh-huh.

Q What was 97 Cooper 3.0?

A That would have been some plan that I was working on, probably the correct name of it. So it should show up on the plan list. Sometimes I would shorten it. The actual name could have been 1997 Congress Plan Cooper 3.0 or congressional plan but the--the 97 should match with the Cooper 3.0 on there, assuming I got the header right.

And this was--I was obviously asked to make some revisions in that plan because the district was still not majority black. And as I already testified, one of the things that we were trying to do to meet Section 2 [*292] requirements in *Gingles* was to make the district majority black, so this just shows me some of the changes I was making to do that at this point in time. I don't know whether these stuck or not.

Q I believe you furnished us as one of the documents Cooper 3.0.

A Okay. Yes. Yeah, probably the 97 Congress Cooper 3.0 is the same as my reference to 97 Cooper 3.0.

* * *

[*293] Q You have got--do you now have that---

A (interposing) Yes, I do. I have Exhibit 18 in front of me along with my e-mail of Monday, February 10th, 8:40 p.m.

Q Now, could you continue your comments about 97 Congress Cooper plan?

A Well, now, it doesn't---

Ms. Smiley: (interposing) Object to the form of the question. Do you know what question is pending, Gerry?

The Witness: He was asking me what the references were from changing 48.1 to 49.25 in the first paragraph. It doesn't seem to match up with the statistics on Cooper 3.0 because on Cooper 3.0 it shows the black percentage as 49.01. But it is possible what happened was that I went to Cooper 3.0 and would edit at various times and each time would just save it under the same name so it gradually changed.

So this--document number 18 is a reference to Cooper 3.0 as it finally wound up and probably this e-mail may have related to some prior version of a plan with the same name. The audit trail there would probably show what I did to 3.0. It is also possible that my reference to 3.0 was wrong and it was actually something else. But I don't know at this point.

By Mr. Everett:

Q On that memo the last line says, "I have moved Greensboro Black community into the 12th, and now need to [*294] take about 60,000 out of the 12th. I await your direction on this." What do you mean by the Greensboro black community?

A Well, in the other plans that we looked at, Exhibits 1 through 5 or 6, I believe that you noted that at one point it was just Forsyth County and then Forsyth and High Point.

I believe at some point I was instructed to include more of Guilford County in the district, and the first thing I did was

to move the precincts, as I noted here in shorthand to Senator Cooper that this probably meant the precincts that were predominantly black or maybe something like 40 percent and over or something like that the area from probably the 6th District into the 12th, which then meant it had 60,000 too many people. So I was asking him what do you want me to remove from the district if we are adding 60,000 from Guilford County into the 12th District in whatever plan I was working off of.

Q Would it be a fair reading to assume that by the Greensboro black community you were referring to 60,000 people?

A Yes, since I said I need to take 60,000 out, it probably meant that I had moved 60,000 in.

Q You didn't refer to them as Democratic or anything like that. You referred to them as blacks; right?

A That is correct.

Q And can you tie that in at all with the precincts that **[*295]** were predominantly black that were moved in at that particular point?

A Well, generally the first thing--the first thing I would do because it was the easiest thing is to take--I was familiar from having worked on plans for 15 years of where the Democratic and black concentrations are in Greensboro.

And the first thing I did was to move the precincts--I think it was probably the precincts in Senator Bill Martin's Senate district or the two predominantly--the two House districts in Guilford County represented by blacks. Probably I moved those into the district first.

And after that I remember going around the edges of the district in the 12th adding in precincts that were heavily Democratic because I already knew that the precincts that were in the predominantly black areas were heavily Democratic. And then I remember going after that--going around the edge looking at all the Democratic precincts that surrounded either the Senate or House districts.

Q Is Senator Martin a state senator that you are referring to?

A Yes, he is.

Q Is he African American?

A Yes, he is.

Q And how many African Americans are there in his senatorial district, if you know?

[*296] A I think it is--the total population may be 54 percent black, 53 percent, something like that. I am not quite sure. I don't---

Q (interposing) With respect to--I'm sorry.

A I don't have that information in front of me.

Q With respect to the map which is attached as Congressional Cooper 3.0---

Ms. Smiley: (interposing) Are you talking about Cohen Exhibit 18?

Q Yes, I'm sorry, the last page there.

A Yes.

Q Does that reflect the moving of the Greensboro black community into to the 12th district?

A Well it has got some dots there that go into central Greensboro on that map, which would have indicated probably that was my first attempt at adding Greensboro to the

12th District. So that probably reflects, looking at the shape, just adding at that stage the precincts that were, you know, 99 percent black and 99 percent Democrat. That is probably what I started with.

Q Now, up to that time would it be true that Greensboro and Guilford--well, Greensboro had not been included in the maps that you had constructed?

A Well, there were several different tangents going on. Of course it was in the 1992 plan that we had done. But [*297] Exhibits 1 through 5 show the district as being just in Forsyth County and then into High Point. Then it went into Greensboro.

I think that there were other series of plans. There is other plans with similar names. For instance, the Martin plans I think all had Greensboro--that series of Martin plans that I had done prior to that all had Greensboro in it. I think there was another series of plans that had Greensboro in it, but I think this was evolving from the Exhibits 1 through 5, this particular trail then including Greensboro in it. I don't know whether this particular thing wound up being the committee plan or it would up being a dead end somewhere.

Q Is the Greensboro black community different from the High Point black community?

Ms. Smiley: Object to the form of the question; if you can understand that reference.

Q At least as you used the term---

A (interposing) Well, Greensboro is a different city than High Point. Probably--from that Exhibit 5 or 6 where High Point was already in the district probably it was extending on

into Greensboro. I mean, this is one plan out of a hundred from two and a half years ago.

Q Do you remember how many predominantly black precincts in High Point were included in the 12th District?

[*298] A Which 12th District?

Q In the 1997 plan; I'm sorry.

A I do not remember.

Q Are most of the predominantly black districts in High Point in Guilford County as you recall, or if not, how many of them are in one of the other three counties which you say reach High Point?

A Forsyth County only has like 20 registered voters in High Point in it and the areas in Davidson and Randolph County in High Point I believe are like 98 percent white. I think there may be 1,000 in each county.

Q So that as a practical matter in High Point all of the African Americans are located in the Guilford County portion of High Point?

A Yes. That is correct.

Q Now, with respect to the move of the Greensboro black community into the 12th, where did you take 60,000 out of the 12th District, if you recall?

A I don't remember; most likely the--usually when I--there was a number of times in different tracks--on these 100 plans that I went down usually it would involve taking precincts out of Davidson, Rowan, and/or Mecklenburg.

Q Would it be a fair inference that most of the 60,000 that were taken out of the district would have been white?

A They would have been predominantly white or [*299] predominantly Republican; yes.

Q And would it also be true that as of this time Durham and Gastonia had already long earlier been removed from the plans entirely?

A I have testified already yes, that is correct.

Q So the evening off--the making up for the move of the Greensboro black community into the 12th District was the removal of white Republicans from other districts?

A Other counties.

Q Other counties?

A Other districts, too.

Q Yeah. Other---

A (interposing) Yes; into other districts from other counties.

Q Into other districts?

A Yes.

Q Do you have any sort of--you said white Republicans. To what extent are you--well, put it this way: was it 100 percent white Republicans?

A I would have gone along the edge of the district all the way around removing precincts consistent with keeping the district contiguous, et cetera, that were the most heavily Republican is what I would have removed any time I had to add something.

Q Well, wouldn't there have been inevitably a number of **[*300]** white Democrats that would also have been taken out?

A Yes. I don't know of any precinct that is 100 percent Republican.

* * *

[*313] Q There is a memo of March 14 indicating "The attached compares Senate Plan C2 with House Plan G." Is this another **[*314]** instance of a comparison as to precincts that are different between--or units that are different between the two plans?

A Yes. These are two later plans that were in negotiation between the House and Senate.

Q And the same explanation would apply to these as to the earlier one?

A Yes, sir.

Q With respect to Davidson County, what--with respect to those two precincts that are in one instance to be in the 12th and the other in the 6th, can you explain where those precincts were with respect to Davidson County, what portion thereof?

A Well, Ward Number 6 is either in Thomasville or Lexington. I am not sure which one it is in. And I am not sure where Cotton precinct is.

Q Do you know whether either of those is predominantly black?

A I do not know.

Q Do you know whether either of those is predominantly Republican?

A I do not know.

Q In Forsyth County where is the Brown/Douglas Recreation precinct?

A Somewhere in the city limits, but I don't know where.

Q Guilford County--well, let's see. Granville County, **[*315]** that is between the 1st and the 2nd. How did that work out in the final plan?

A That was probably the change that I mentioned that was requested by a member from that area. Right, it is. It has got Butner and Creedmoor, which I had testified to earlier being moved from the 1st to the 2nd. Brassfield and Tally Ho are along the Durham County line as well.

Q Now, in Guilford you have a GB-18 and a GB-35C, and one the precinct--well, sort of--one is in 6 in one plan and 12 in the other and vice versa. Do you know what that involves?

A No. Most likely it was trying to get the population equality right so precincts in Guilford were switched, possibly even irrespective of anything relating to their characteristics of the precinct but trying to get the population equal. That is probably what happened on this one.

Q And you are unaware of either the racial demographics or the political voting results in those two counties?

A Certainly not from memory; it would be in the--it would be in the statistics available.

Q In Iredell County in the Senate plan, C2, there are a number of precincts that are placed in the 10th District and in the House plan those same districts would be in the 12th District. Can you explain what is involved there?

[*316] A The House proposal had more of Iredell in the 12th District, and my recollection is that Senator Cooper did not like that idea because they were predominantly Republican and did not--I don't know whether--which was the final result, but I remember that he characteristically did not want any more of Iredell added because it was very heavily Republican.

Q Do you remember any characteristics racially one way or the other?

A I think Chambersburg is about 40 percent black, but I think the Coddle Creek and Barringer are overwhelmingly or almost all Republican white.

Q Looking at Jones County, where in the Senate plan five precincts are in the 1st District--I mean in the 3rd District rather, and in the House plan they are all in the 1st, can you explain what is involved there?

A Well, this eventually--since eventually all but one precinct in Jones County wound up in the 1st District, then the House position must have prevailed here. These are probably the five precincts. I think the earlier Senate plans had all of Jones in the 3rd District and the House had proposed moving five of the six precincts. And I think the Senate agreed to this change eventually.

Q Do you know anything about racial characteristics or political characteristics of those five precincts?

A Jones County is very heavily Democratic and the county **[*317]** as a whole is probably 45 percent black, but I don't know anything specific about those precincts.

Q With respect to Mecklenburg County, do you recognize the location of any of the precincts that are listed there from what is stated here as the designation?

A Yes. The House had proposed putting Cornelius, Crab Orchard to Davidson, Long Creek 1 and Charlotte 105 in the 12th. Except for Davidson all of those precincts are heavily Republican.

I believe that the Senate--that these precincts, Charlotte's 5, 35, 45, 62, 84 and 95, are precincts my recollection is that are Democratic precincts that the Senate

wanted to put in the 12th District, or more Democratic than other precincts in the county anyway.

Q And do you recall---

A (interposing) Certainly more Democratic than places like Cornelius and Crab Orchard.

Q And do you recall how that finally was resolved?

A No, I do not.

Q On Person County there seem to be a number of the precincts that are in the Senate plan would have gone into the 4th District and under the House plan would go into the 1st. Can you describe what is involved there and what the resolution was?

A I think this was in the--this was part of moving--I am [*318] trying to think. Roxboro--Roxboro wound up being in the 1st District, so it looks like on this particular issue they were deciding--I mentioned earlier that Granville and Person were being divided and there was obviously a difference of opinion between the Senate and House how to do it. Roxboro--all of Roxboro wound up being in the 1st District eventually, so I guess the House position wound up prevailing here on how to divide Person.

Q But Person was divided ultimately?

A Yes.

Q And Roxboro is what, in the southern part of the---

A (interposing) Central part of the county.

Q Central part. Pitt County, is the divergence between--well, let me ask you this. In the Senate there are four counties that are placed in the--I mean, four precincts that are placed in the 1st District. Those same counties in the House plan are placed in the 3rd District.

A Yes.

Q Are those the precincts that were involved with--well, how many of those precincts are involved with location of Farmville and access to there?

A I think Arthur and Simpson are the ones between Farmville and the southeastern part of the county. I am pretty sure. But this would have been the change that the Senate wanted to put Walter Jones in the 1st. I am not sure [*319] why at this point the House's position that Jones be in the 3rd.

There were a lot of negotiating points that went on that you would see a proposal from the other side and you would think "They don't really want this. They must want the other thing," which you never know why in bargaining-- somebody sometimes will ask for something they really don't want because they don't think you will give it to them.

Q Moving down to Rowan County---

A (interposing) Yes.

Q ---you have Bradshaw, Enochville and West Ward, three precincts that in the Senate plan were going to be in the 12th District and in the House plan would have been in the 6th?

A Uh-huh.

Q Who was the--okay. Who was the incumbent for the 6th District at that particular point?

A Howard Coble.

Q With respect to those particular districts, what was the resolution in terms of where they were placed?

A I don't know the eventual conclusion. That would be in our submittal.

Q Do you know anything about the demographics of those districts?

A Bradshaw and Enochville are predominantly Republican, **[*320]** and I don't know where West Ward II is.

Ms. Smiley: Mr. Everett, I would note that it is 6:35 and I hope you would finish at least by 7 o'clock.

Mr. Everett: I think I can assure you I will.

Ms. Smiley: Well, we have exceeded the six hour limit. Let's finish up.

Mr. Everett: That is great.

By Mr. Everett:

Q So this comparison that we have just been going through indicates the points of difference that were still outstanding on March 14?

A Right. And that was--at some point in time I was asked to run that report. There were lots of other plans. There were sometimes several a day put forward by each side. This was a case--they must have been--they must have been serious about at that point those two plans because I was asked to run a report. So that must have been some significance on each side to that particular plan, but I don't know whether that was the penultimate or middle or where it was in the process of negotiating.

Q And there is a reference on March 14th also in your memo to Senator Cooper that information on the House Plan G has been sent to the NCEC, which was processing it.

A Yes. Senator Cooper would have asked me, you know, "Let's look at statistics on the House's latest proposal from **[*321]** a partisan standpoint."

Q Then in the next document, which bears date of March 18th, 1997, there is a reference to various documents that have been filed and the location of particular precincts that apparently was the subject of earlier discussion.

A Uh-huh.

Q And are all of these precincts so far as you can determine among those that are listed in the earlier enumeration of differences?

A This is a draft--in other words, the actual memorandum on March 18th or 19th may or may not be the same as this draft. This was a draft--the reason I included it here, it was a draft of a memo and I don't know whether it was a change between that and the one that actually accompanied Senate Bill 433.

But what I did here is basically outline the details of the plan and what was divided and if we had to go to zero deviation what changes would have to be made, which I discussed were--had no political consequence, but might be needed to satisfy the *Karcher* decision.

Q And on the date of that memo you forwarded the memo to Senator Cooper for his inspection?

A Yes.

Q Then there is a memo of March 19th, and what is that, if I may ask?

[*322] A Well, this was near the very end of the negotiations, and the two points in controversy at that point between the House and the Senate were--Sampson County and Wake County were the two issue left at that point in negotiations. And this memo talks about what the outstanding

differences were in that point in time. That was all that was left of negotiations at that point.

Q And so those pertain to districts other than those that are directly involved in this litigation?

Ms. Smiley: Object to the form of the question. You can answer if you can.

A Well, the legislative process is one of compromise, and every district was part of the legislation in the 1997 plan and the--just like many of the decisions that I have already testified had nothing to do with race.

These last points of discussion between the House and Senate had to do with differences between the 2nd, 4th and 7th District, nothing--many of the final negotiations and discussions had absolutely nothing to do with the 1st District or 12th District.

Q And would it be true that these districts might have had a ripple effect that could have affected the 1st and the 12th or would that have been as a practical matter impossible?

A At this stage on March 19th, the discussions were the **[*323]** 2nd, 4th and 7th Districts had not yet been finalized. I believe everything else had been agreed to at this point in time, the night before the final compromise was reached.

Q So everything on the 1st and the 12th had already been agreed upon at that---

A (interposing) I can't tell you if at the last minute some final change was made, but my recollection is that a lot of the discussions had to do with precincts in north Raleigh and Clinton, and I think they had absolutely nothing to do with anything except partisan politics.

[*18] Q And in drafting the plan, did you pretty well proceed on the premise that if there was a high percentage of African Americans, there would be--and who were registered to vote, that there would be at least that high a percentage of Democrats registered to vote in a particular precinct?

A We did not use registration figures in determining how we were looking at a precinct or a county or a district in a partisan manner. Registration numbers were meaningless to me.

Q How about in matching up the voting results in those three races that I mentioned? Was it pretty clear to you that the African Americans who had registered had voted as Democrats?

A I did not do that analysis and that did not enter into **[*19]** my thinking. We were looking at it on a partisan basis. It didn't matter what the race was. But it would not surprise me that that would be a relatively high number.

Q Incidentally, if you are looking at something on a partisan basis and were trying to assure--and you are a Democrat; right?

A Yes.

Q In trying to assume a Democratic perspective, if you wanted to have some sure thing Democrats, you couldn't do any better than North Carolina than having a large number of African Americans in the particular precinct, could you?

A Well, nothing is ever a sure thing, but obviously African Americans as a general rule are supportive of Democratic candidates in many instances; yes.

* * *

[*36] Eventually it became my belief that there should be a majority minority district in the 1st District, but I can't remember at that time whether I believed that. I don't remember.

Q Why did you come to the belief that a majority minority district should be there?

[*37] A In the 1st District?

Q Yes.

A There was evidence presented to the judiciary--excuse me; the redistricting committee that Section 2 of the Voting Rights Act would require it. And then in drawing the district as we moved through the process, it was very easy to draw a compact--functionally compact district and have a majority minority, which I think would be evidenced by the initial plan that I presented to the senate committee.

Q You used that term "functional compactness." What does that mean?

A It means a district that is reasonably compact and that you pull together communities of interest, with like interest, and you put them together in a district. I think it means that it is not--it is as absolutely mathematically compact as it possibly can be, but that there are other criteria that you use as well.

Functionally compact can also mean that we take election results into consideration to make the district so that it would pass both houses of the General Assembly as well.

(Mr. Cohen exits at 2:25 p.m.)

Q So functional compactness also includes making sure that the political results are concerned--are considered?

A Yes, specifically because of what we had to do in [*38] getting the plan passed.

Q Now, in reading some of these Supreme Court cases to whatever extent you have read them, did you come across the term "geographic compactness"?

A I don't specifically recall that, no.

Q Did anybody--were you advised that functional compactness was a permissible criterion?

Ms. Smiley: Object to the extent that you are asking whether or not he received any legal advice.

A I think functional compactness is a term that we used to describe what we did. I mean, it--I don't think it was lifted from any case, to my knowledge. It was something to put a good description on what we did.

Q Is racial fairness part of functional compactness?

A Yes.

* * *

[*53] Q Now, at a later time when you were presenting I guess Plan A, did you talk to the members of the Senate or maybe the committee there, the redistricting committee, about some of the things you had considered in drawing the plan?

A Yes.

Q Do you remember telling them that--in words to the effect that since this was less than a majority African Americans and it was not majority white that it was not subject to the requirements that would apply to a majority black district?

Ms. Smiley: Object to the form of the question; did you say District 12?

Mr. Everett: Pardon me?

Ms. Smiley: Did you reference District 12 or a specific district, or are you just asking the question generally?

Mr. Everett: I am asking him with respect to the 12th District.

The Witness: The 12th District.

Mr. Everett: In Plan A, yeah.

The Witness: Yes.

[*54] Ms. Smiley: I just don't think you said District 12.

Mr. Everett: Okay; I'm sorry.

The Witness: Yes, I recall saying that in my belief one of the arguments that the district would be constitutional would be that it was not a majority minority and I believed that that was a very good argument that the district was constitutional.

By Mr. Everett:

Q Had you been advised to that effect by anyone?

Ms. Smiley: Object to the form of the question to the extent that you are asking for legal advice. If you want to ask about any other people who informed him, that's fine.

Mr. Everett: Okay. If I understood you correctly, you are saying you object insofar as to ask for whether it is legal advice---

Ms. Smiley: (interposing) Well, if it is asking for the advice of--you know, any advice given by the Attorney General's Office and legal advice, I mean, you know, it is privileged, anything we say to him. But if you want to ask him nonprivileged communications---

Mr. Everett: (interposing) Okay.

By Mr. Everett:

Q So you did consult extensively with the Attorney General's Office?

[*55] A Yes.

Q And regardless of what they advised you, you came to the conclusion that a majority--that unless it was a majority black district it was not subject to the same requirements as a majority black district?

A I didn't come to that conclusion; I came to the conclusion that that was a good argument to argue the constitutionality.

Q Do you remember---

A (interposing) I think when I began doing that was when someone questioned the constitutionality solely on the basis that he thought that it was unconstitutional because you said it was. And so at that point I needed to make some arguments as to the constitutionality. And in addition to all of the other arguments I made, that was one of the arguments that I made to the Senate.

Q Let me just ask you whether this sounds like what you said concerning the 1997 plan:

> "I believe that this new 12th District is constitutional for several reasons. First, and maybe most importantly, when the Court struck down the 12th District it was because the 12th District was majority minority and it said that you cannot use race as the predominant factor in drawing the districts.
>
> Well, guess what. The 12th District, under this [*56] plan, is not majority minority.

Therefore, it is my opinion and the opinion of many lawyers that the test outlined in *Shaw vs. Hunt* will not even be triggered because it is not a majority minority district and you won't even look at the shape of the district in considering whether or not it is constitutional. That makes an eminent amount of sense because what is the cutoff point for when you have the trigger of when a district looks ugly? I think that the court will not even use the shape test, if you will, on the 12th District because it is not majority minority. It is strong minority influence, and I believe that a minority would have an excellent chance of being elected under the 12th District."

Is that what you said?

A I recall saying that in addition to making other arguments as to the constitutionality.

Q When you speak of your opinion, you, of course, are a lawyer?

A Yes.

Q And soon may be the chief legal officer for the State of North Carolina?

Ms. Smiley: Object to the form of the question.

Mr. Everett: All right.

Ms. Smiley: It is not necessary to answer that [*57] question. Senator Cooper has already told you he is a lawyer but he is not a redistricting lawyer.

Mr. Everett: Well, let me just finish the question.

By Mr. Everett:

Q And the opinion of many lawyers that this test and so forth don't apply, did you talk to other lawyers besides those in the Attorney General's Office?

A I don't recall specifically whether I did. I came to the conclusion after talking to lawyers that that was a very good argument to make. I had not even thought of this while drawing the plan. I thought of the argument after the plan had been drawn that hey, this is not a majority minority district so why should it even be triggered. It made common sense.

I didn't base it personally on any case law. I didn't do any research and I am not a redistricting lawyer. But it makes common sense. I ran this opinion by some lawyers, and they told me it was a good argument to make, so I did.

Q So you as the chair of that committee made that statement for the legislative record; correct?

A Yes.

Q And did you at any time prior to the enactment of the 1997 plan ever say anything to the Senate or to your committee wherein you purported to withdraw or limit that [*58] particular statement?

A No.

Q So what you said then as far as you were concerned remained the last word right on through until the plan was enacted?

Ms. Smiley: Objection; what do you--I mean, if you can answer what you said meant was the last word---

Q (interposing) As far as you were---

Ms. Smiley: ---you can try to answer that. But I object to the form of the question.

A That as far as I was concerned remained one of the arguments to be argued that the district was constitutional.

Q Now, when you all started to draw the plan, did you outline certain purposes that were to be served?

A Yes, sir.

Q Contiguousness was one of them, wasn't it?

A The purposes were to correct the constitutional defects in the district and to have a plan that had a partisan six-six balance so that it would get enough votes in the Senate and the House to get it passed. Those were the prime directives.

Q And with respect to the purposes, when you were drawing the plans--or when then plans were being drawn back in the 1996 period after *Shaw v. Hunt*, were you concerned with partisan balance at that particular point?

[*59] A I don't recall for certain. When the partisan balance issue became crystallized was when after the '96 elections we had a six-six split. I don't specifically recall thinking about drawing plans before those elections. We may have, but I don't remember. And I don't know when the dates on these particular plans were. I just--I just don't recall.

* * *

[*62] Q Now, with respect to the route followed, isn't it true that in the plan that was ultimately adopted, the '97 plan, you don't follow 85; you go out of Greensboro onto 77 and go up and pick up some black precincts in Statesville and Salisbury and then come back over to 85 and at various points depart from I-85? Wouldn't that be true?

Ms. Smiley: Object to the form of the question.

Mr. Everett: Okay.

Ms. Smiley: Object to the characterization. I don't think he said that he has gone out and picked up black precincts anywhere.

The Witness: Yes.

Mr. Everett: All right.

The Witness: You know, I can't specifically remember where the interstate is in regard to this, but it is in the general vicinity of the areas between Guilford and Mecklenburg County and in the general travel route as far as **[*63]** I remember.

By Mr. Everett:

Q Well, if you were traveling from--the best you remember, if you were traveling from Greensboro to Charlotte, could you have done so and stayed within that district and followed the most direct route?

A We had to pick up enough population along the way to make a district. And basically in drawing this district we looked at the community of interest. We put together what we believed to be a functionally compact district between Guilford and Mecklenburg County. But the driving force behind it was the partisan balance issue.

Just going back to this map, as I recall, when this idea was discussed of going from Charlotte to Winston-Salem I said that that made no sense because we need to keep, number one, the Triad together, and number two, there are really no areas around the 12th that need help from Democratic leaning voters in Guilford and Forsyth and Davidson and Rowan and Iredell and Mecklenburg. So why not go ahead and let's put all of

those Democratic leaning voters based on election results in the 12th District and make it a solid Democratic district?

And that was the--it may be even more of a driving force than the community of interest. Although the community of interest was important, it was important not to separate [*64] the Triad because they are sort of an entity. And to pull Winston-Salem out and pull it away from High Point and Greensboro, that didn't make geographic sense.

Q So you are saying that High Point and Winston-Salem should be kept together. And are you saying---

A (interposing) And Greensboro.

Q And those should be tied in with Charlotte?

A Yes.

Q Okay. And so---

A (interposing) The Democratic leaning voters in those districts.

Q And those---

A (interposing) In those areas.

Q And for the most part, those were African American; right?

A I don't know if you could say for the most part. It is a not a majority minority district. So I wouldn't characterize it as for the most part.

Q Well, let's put it this way: as far as those three counties that include Charlotte, Greensboro, High Point and so forth, each of those counties is--the portion of each of those counties that is included in the 12th District is majority black, isn't it?

A Say that again.

Q Okay. Take--there are six counties in the 12th [*65] District---

A (interposing) Okay.

Q ---as it was drawn. Isn't the portion of Guilford County that is in the 12th District majority black?

A I really---

Ms. Smiley: (interposing) I am going to object to the form of the question. I mean, this is---

A (interposing) Well, I don't remember.

Ms. Smiley: This is population data that is in the record, and for you to expect--unless Senator Cooper absolutely knew and that is what he was using, I don't see any point in him trying to guess or speculate.

Mr. Everett: Well, we are trying to find out what he did know and what he---

Ms. Smiley: (interposing) Well, why don't you ask him if he knows, not whether it is true?

Mr. Everett: Well, I am asking---

Ms. Smiley: (interposing) Ask him if he knows---

The Witness: (interposing) I don't remember; I really don't remember.

By Mr. Everett:

Q All right; the same question with respect to Forsyth?

A I don't remember that. I know that they were mostly Democratic leaning. And I really don't remember.

Q And did you know that--you did not know they were [*66] mostly--you did not know whether they were mostly black?

A Well, yes; I knew that there were a significant number of African American voters there, yes. And we didn't ignore that fact. I mean, that is true. I don't know whether I would

characterize it as mostly, but there were African American voters there.

Q And is it true that you--well, didn't you proceed on the premise that they would--the African Americans would be registered as Democrats and vote as Democrats?

A We didn't look at registration data. We looked at election data.

* * *

[*68] Q Now, with respect to the 12th District as it currently--well, as it was in the 1997 plan, if it is-- assuming for the moment that it was being viewed as being constructed with a predominantly racial motive, are you aware of any compelling governmental interest for its being constructed as it was?

Ms. Smiley: Object to the form of the question.

Mr. Everett: Okay; I will rephrase it.

By Mr. Everett:

Q Do you know of any compelling governmental interest [*69] for the 12th District having the form that it now has?

Ms. Smiley: Objection; are you asking for a legal conclusion?

Mr. Everett: Pardon me?

Ms. Smiley: Are you asking for a legal conclusion?

Mr. Everett: I am asking him for his personal conclusion.

Ms. Smiley: Okay; then you can answer.

The Witness: Going back the community of interest, you mentioned traffic congestion. That is an issue---

Q (interposing) I'm sorry?

A You mentioned--going back to the communities of interest, it comes to mind that you mentioned traffic congestion in Winston-Salem and Greensboro. That is also a significant problem in Mecklenburg.

I think a largely urban district has a lot of common problems that government can try to address and that a member of Congress from that district can try to address, so I think that certainly the community of interest in that area is a governmental interest.

Q Any other compelling government interest that comes to mind?

A I think as opposed to the '92 plan, it is much easier to know what district you are in. There are no split [*70] precincts, as it were. I think there is one that was maybe a satellite annexation in the 12th. But everybody in the same precinct knows what district they are in. So I think that that helps clear up matters significantly.

Q Okay. And---

A (interposing) There may be others. We considered a lot of issues when we drew these maps that I can't recall at the moment, but there may be others.

* * *

[*70] Q Senator Cooper, with respect to the 1st District, are [*71] you able to state any compelling interest why that had to be--why that was drawn as a predominantly--well, pardon me; as a majority black district?

Ms. Smiley: Object to the form of the question; I assume you are not asking for a legal conclusion?

Mr. Everett: No; just personal.

Ms. Smiley: To the extent you can answer---

The Witness: (interposing) Compelling governmental interest---

By Mr. Everett:

Q (interposing) Right.

A ---as to why it was majority---

Q (interposing) Uh-huh.

A I think there are compelling governmental interests as to why it was drawn as it was. It is a largely agrarian district. The northeastern part of the state is generally probably one of the poorest areas of the state.

There are a lot of concentrations of the Tier 1 counties under the Bill Lee Act to get greater tax incentives for poorer counties. There are a lot of those concentrated in the northeast. They have a lot of problems that are related to their rural nature and the poor nature. And all of that, I think, helped make us decide to draw a district up in the northeast.

As to why it was majority minority, first we did [*72] believe that under Section 2 of the Voting Rights Act that it needed to be majority minority, but that we could draw the district in a functionally compact manner and still have majority minority. And historically that district in that area, oftentimes the 2nd District in history, had a large concentration of African Americans that lived there.

So I think with all of those reasons we came to the conclusion that the district should have been drawn as it was.

I think really that the district that I presented to the Senate was a little better than the district we ultimately ended up with.

Q What do you mean in that regard? Can you explain that?

A I think probably it was a little more functionally compact than the district that we ended up with. But there were partisan considerations and the effect of the 3rd and the 2nd and all of the negotiations that went on there that required the additional changes that we made in the 1st District.

* * *

[*74] Q And that was not one of your express objectives anyway to have geographic compactness?

A I think geographic compactness, having people close together as much as possible, is part of being I guess this term we coined functionally compact. That is a component of communities of interest.

Q Well, now, you were aware, weren't you, that when you created the 12th District in the 1997 plan you were splitting each of the six counties in that district?

[*75] A Right. And most of that had to do with the partisan nature of the district.

Q And also with maintaining the core; right?

A That is part of it, yes. But most of that had to do with the partisan nature of the district.

Q And so is it your testimony, then, that the 12th District was going to vote Democratic? Is that it?

A I don't think anybody can absolutely predict, but from the election results that we analyzed District 12 would be a strong leaning Democratic district; yes.

Q Okay. Would you also have been able to predict that the Democratic candidate to be elected would be African American?

Ms. Smiley: Object to the form of the question; if you can attempt to answer that question, go ahead.

A No, I don't think you could predict that. I do think an African American would have a good chance at winning that district; yes.

Q Has it been your experience that African Americans have a strong desire to have persons of their own race elected to public office?

A I think that many African Americans believe that there need to be more people elected to public office who are African American; yes.

Q And is that part of the concept of racial fairness, [*76] having more persons of minority groups, minority ethnic or racial groups, elected to office?

A I think that racial fairness means making--well, racial fairness means that you have a district where an African American would have a good chance at winning the election; yes.

* * *

[*77] Q Did you have any contact Representative Watt or any person who purported to be acting in his behalf with

respect to the percentage of African Americans to be included in the 12th District?

A Well, first I talked with, I think, every member of Congress or their representative except for Congressman Taylor. I don't believe that I talked with anybody in his office with respect to the 11th District. But yes, I did have conversations with Congressman Watt and with representatives of his office concerning many things involved with the 12th District. And one of those would have been race, yes.

Q And in the course of any of those discussions was it indicated that he would like to have as high a percentage of African Americans as could reasonably be put into the district?

A He wanted to maintain as much of--as many of his constituents as he had under the old plan; yes. He wanted to keep as much of that as possible.

[*78] Q And by constituents did he identify which constituents, by race or otherwise?

A He wanted to keep as much of his district as he could. But that was a goal of many of the members of Congress with whom I talked because of the fact that they send letters and communicate with each other, and so he wanted to do that.

Q So he wanted to maintain as many of the voters from the original 1992 plan 12th District--he wanted them to be--continue in his district to the greatest extent possible?

A As much as the constitution would allow under the constraints of *Shaw v. Hunt*, yes.

* * *

[*80] believe you said something to the effect that among the factors you took into account in configuring one of the [*81] districts was race. What did you mean by taking it into account in this context?

A Racial fairness was one of the factors that we considered in drawing the districts.

Q And racial fairness was what?

A We wanted to draw districts that cured the constitutional defect in the plan but still maintained the core of the plan. And racial fairness was a part of that.

Q Maintaining the core of the plan was in your view part of racial fairness?

A Uh-huh.

Q Okay.

A Yes, it was.

Q Somewhere along the line according to some notes I had, you said that back in February of 1997 in talking to the Senate committee, "What we tried to do was make each district more geographically compact leaving the core are for each of the present districts." There when you were referring to geographic compactness, what did you mean?

A Making it look prettier.

Q Okay; maybe I need to get you to clarify what is pretty and what is ugly in this context.

A I guess it is up to the Supreme Court. I think that specifically the court did not like one county having three congressional districts. The court did not like the double [*82] crossovers and point contiguity and long areas where you didn't have any people connecting counties and precincts and

areas. And putting things more geographically together was one of the issues that we looked at.

Q So that---

A (interposing) Not as many counties being split, trying not to split precincts; I think that is all part of geography.

* * *

[*104] A I just don't know. I mean, racial fairness was important, and having a plan that was racially fair was important to me, and it was important to other legislators with whom I---

Q (interposing) And racial fairness is like minority representation?

A Well, having an African American fair shot to winning a congressional district, yes.

Q And what is necessary for a fair shot?

A I think what we did is a good example of that.

Q When you---

A (interposing) But keeping in mind that you have got all the other constitutional criteria to meet at the same time.

Q Well, let me ask you this: in 1997, in March or thereabouts, to give African Americans a fair shot, you created a 12th District with about 47 percent black; is that right?

Ms. Smiley: Asked and answered, and he has also indicated 47 is an approximation.

Q About that; okay?

A Yes, I do think that would give an African American a [*105] fair shot to win that district; yes.

Q And then in 1998 did you also try to create a 12th District that would give an African American a fair shot?
A Yes. I mean, that was one of the factors in drawing the district in 1998; yes.
Q And at this time it was about what, 35 percent?
A I think that is right. I don't remember.
Q Significantly less, in any event?
A I don't remember specifically, but yes, it was less.
Q Can you explain why it was necessary to have that 47 percent or whatever it was, that significantly higher percentage, in 1997 and then the legislature went back and cut it back to 35 percent?

Ms. Smiley: Object to the form of the question if you are implying in any way that the legislature voluntarily went back and did that. If you can answer the question, go ahead.

A What we did between the '97 and '98 plan is read--and I don't remember it all now, but at the time we read line by line the three court--three judge panel's decision. And we tailored the '98 plan to try to address every problem that they pointed out with the plan. And that is how we drew the '98 plan.
Q Still trying to give a fair shot, right, to---
A (interposing) That was, yes, one of the factors. But **[*106]** the overriding factor at that point was going through and addressing the court's issues and drawing a plan that would be constitutional.
Q But you were still doing it for partisan fairness and incumbent protection, the same objectives?
A All those objectives were there, yes.
Q Could you answer this? Why couldn't you have created a district with 35 or so percent in the first place to give

minorities--a minority candidate a fair shot and not had a six county district all of which were split, et cetera?
A A couple of reasons: one, we felt that we had complied with *Shaw v. Hunt* with the district that we drew. We significantly shortened the district--you are talking about going from Gastonia to Durham--and significantly shortened it, significantly widened it, kept communities of interest.

And as I told you before, basically you were wasting Democratic leaning voters when you look at the issue of partisan balance if you simply put those Democratic leaning voters in surrounding districts, which are Republican districts anyway.

Q Well, let's see; Congressman Hefner, he was there at that time, right?
A That is correct, but there was really no way to help him. Cabarrus is his home county and he wanted all of that **[*107]** in his district. But there was really no way to help Congressman Hefner with the 12th District.
Q How about putting some of those folks in from Mecklenburg County?
A Congressman Hefner I don't believe was interested in representing part of Mecklenburg County.
Q You don't think he would have liked to have had black--would have liked to have had black Democrats from Mecklenburg?
A That never was requested by him and it never came up in our discussions.
Q So nobody ever suggested that as an alternative?
A Well, no; I am not saying that. I mean, I think Senator Cochrane presented a Mecklenburg to Robeson plan on the

floor, so that yes, it was suggested but it never did enter my way of thinking as what we ought to do.

Q Well, what I am wondering about is the extent to which you looked at the alternatives around about there and decided that it would be a waste to take any of these solid Democratic voters, African American voters, and put them in some other district where they could help Democrats.

Mr. Stein: Object.

A Well, as I have said earlier, the surrounding districts were all solidly leaning Republicans. And from my conversations--like I said, I talked to all the members of [*108] Congress or representatives except for Congressman Taylor. And from my conversations with those folks they were fine with the 12th District as we drew it.

Q And Congressman Watt was particularly fine with it; correct?

A Well, I think Congressman Watt had some public comments that he did not want to lose the constituents that he had before. But I think that he accepted the plan because he understood the court's decision---

Q (interposing) He had no choice, did he?

A ---and he accepted it. No.

Q Well, when you reduced the number of African Americans in the 12th District by some 10 percent at least in 1998, these were all--virtually all Democrats; right?

A That is correct.

Q You had no---

A (interposing) Now, wait a minute; no. Okay. Ask your question again.

Q Okay. My question is in some way or other you went from 47 percent to around 35 percent?

A Because we followed the lower court's order; they said the district was not constitutional. We disagreed, but we had to do it.

Q Yeah.

A So we did it.

[*109] Q And that meant removing 10 percent of the population of the 12th District and putting it somewhere else; is that what---

A (interposing) That was a natural occurrence of complying with the court's order; yes.

Q Okay. Now, and that was all--they were all--virtually all Democrats; right?

A I mean, you know, I don't remember specifically. Yes, the part in Guilford that we included in the 12th was strong leaning Democrat. And I don't want to characterize it as virtually all were Democrats, but it was a strongly leaning Democratic voters. And yes, they were taken out of the 12th and put into the 6th, Congressman Coble's district.

Q And all of those were black, correct, virtually?

A No.

Q What percentage of those that were---

A (interposing) I told you I don't remember the percentage of African Americans. It was a strong Democratic leaning area.

Q And that being--taking this Democratic leaning group and putting them in Coble's district, was that just a waste of the Democratic votes? Is that the way you viewed it?

A Huh-uh. I don't want to characterize it as that, but I don't think it would have affected Congressman Coble's district so that a Democrat could be elected.

* * *

[*112] Q Now, if you look at some of these plans, the Winner/Cooper plan back in 1996, back in the summer of '96, you will find districts which are pretty much like the 12th District in 1998?

A There were some plans that were fairly close to that; yes.

Q My basic question then is why didn't you adopt one of those plans in 1997 instead of going for a much higher percentage of African Americans?

Ms. Smiley: Object to the form of the question; he hasn't said that the reason they adopted the plan they did was because of the percentage of African Americans in the 12th District.

Q I am just asking you why they didn't do it.

A Going back to the partisan issue of going ahead and [*113] making it a strong Democratic district where you really could not help any of the surrounding district, going back to the partisan issue.

Q But isn't it true you knew very well if you had 47 percent African Americans in that total population it was going to at the very least be Democratic?

A Yes. Well, yes; I mean, we looked at the election results of that district, and yes, we knew that it was going to be a strong Democratic district.

Q And you didn't even really have to look at the election results, did you?

A But we did; I mean, we did pretty specifically look at it.

Q And that confirmed pretty much what you would have anticipated anyway; correct?

Ms. Smiley: Object to the form of the question; he said that he looked at election results. He didn't make other inferences.

Q Did anybody tell you--go ahead.

A I think--I am not even sure what I am answering at this point.

Q You have probably answered it. Did anybody tell you that it was going to be 47 percent? I mean, did Gerry Cohen or somebody say 47 percent would be African American?

A Yes, we knew the racial composition of the district, [*114] yes.

Q And---

A (interposing) It was printed out on each plan along with all of the other demographic information.

Q And didn't you know very well as a direct inference from that that that meant that it would be very strongly Democratic as well?

A I don't think you can just look at that by itself because you don't know what kind of district that you have. But I--it is hard for me to separate that from my knowledge of the election results of the district. We knew it would be a strong Democratic district, yes.

Q Well, what I am asking you basically is when you put 47 percent African American there, weren't you really just using race as a proxy for politics for your Democrats?

A We looked at election results is what we looked at. That was the primary tool that we used in drawing the 12th District. Yes, racial fairness played a part in it.

* * *

[*128] Q Has anybody anywhere ever advised you that functional compactness was a permissible redistricting principle?

Ms. Smiley: I am going to object to the extent that you asking him for any conversations with legal counsel. To the extent that you can answer---

A (interposing) I don't recall that. I think that is **[*129]** just a term that we were able to use to show that we considered many factors in drawing the plans.

Q In other words, you are not saying it is--you didn't originate the term? You weren't the first person that said---

A (interposing) I don't remember how it got started.

Q Okay.

A It sounded good; we started using it.

Q All right.

A I don't know coined it. I don't know.

Q And you are not aware---

A (interposing) I have no clue if it is in any case law or not. But I mean, we have talked about this, and there are many factors.

And this is not necessarily all-inclusive, but we talked about trying to keep as many counties whole as we could, trying not to split precincts when possible, trying to look at communities of interest, trying to make sure that we had a

partisan balance, to make sure that it was racially fair, to look at the incumbents and consider that because that was important in getting enough votes to get it past the General Assembly because of the influence that they had over the General Assembly. All of those things I think come into play. And there may be a few more that I have left out.

A I suppose there is no point in going back and asking **[*130]** you about community of interest which you used in your last answer. You have already talked about that earlier. Do you remember whether when the time came to prepare the Section 5 submission you had any involvement in that?

Ms. Smiley: For which plan, the 1997 plan?

Mr. Everett: Right.

A Do you mean submitting everything to the Justice Department---

By Mr. Everett:

Q (interposing) Right.

A ---for preclearance? Yes, I did have involvement.

Q What was your role and who else was involved in that?

A I talked to members of the Justice Department. That is about it. I mean, I talked to them.

Q Who actually submitted it, under what name, if you recall? Was that by the Justice Department, by you, or somebody else, if you recall?

A It was a combination of the Justice Department and the General Assembly staff putting things together and submitting it. I don't know under what name they put it under.

Q And in that context was it your belief that because the Section 5--because there was a majority black 1st District that

the Section 5 submission for preclearance would in fact be precleared?

A That was an important part of preclearance, but as I [*131] recall, the 12th had to be precleared, too. So I mean, I think both of them---

Q (interposing) The whole plan, didn't it?

A The whole plan had to be precleared, but they were looking at both of them.

Q And did you have any concern as to whether it would be precleared or any belief as to whether it would be precleared if the 12th District had a much lower percentage of African Americans?

Ms. Smiley: Object to the form if you are asking for a legal opinion.

A I did not have too much concern about it because we had a Supreme Court decision striking it down and I thought the Justice Department would take that into consideration when we submitted the plan. So I did not have a great deal of concern. You never know what the Justice Department is going to do and I really didn't know. But I was more concerned with correcting the constitutional defects.

* * *

[*132] Q Did you have any other election results you considered besides the three that you mentioned?

A Yes.

Q What were those results and how did you obtain them, from whom?

A I obtained them from an organization called the National Committee for an Effective Congress. They had some election results in the different districts from 1990 to I believe 1996. And we used those election results along with those election results that were already in the General Assembly computer.

Q Those results that you obtained from the NCEC were not put into the computer at any time?

A No, they were not.

Q It was not published in any way you were relying on them?

A It was their data that they were letting me look at.

Q Is that organization affiliated in any way, direct or indirect, with a political party?

A I don't know if they are affiliated, but they [*133] are--what they do is that they try to affect the process so that Democrats are elected to Congress. That is at least part of their mission.

Q Is any of their mission assuring that minority persons get to Congress?

A No. They started out telling me that, but they had no interest in that whatsoever.

Q So their mission was simply to give you results in that regard as to what the likely outcome would be?

(Witness nods affirmatively.)

Q When did you get those results from the National Center?

A When did I get them?

Q Uh-huh.

A At various times when I requested the information through the entire process.

Q Was it pretty clear to you from that information that an African American would be elected or reelected to Congress from the 12th District under the plan you drew?

A I didn't affect my opinion one way or the other. I felt that an African American would have a fair shot at being elected in the 12th.

* * *

[*138] Q Now, with respect to the 12th District, the six counties, all of which were split in the '97 plan, is it your testimony that could not reasonably be avoided consistent with other goals?

A That is correct, yes.

Q So that---

A (interposing) Other goals were more important than having whole counties in the 12th.

J. H. FROELICH DEPOSITION (EXCERPTS)

[*7] Q Have you always lived in North Carolina?

A I have always lived in North Carolina and always lived in High Point, North Carolina.

Q Could you tell me what your educational background is?

A I went to school in High Point, then to Woodbury Forest School in Orange, Virginia. And then I went to the University of North Carolina at Chapel Hill and then I was in the first MBA class in Chapel Hill, graduating in 1953.

Q All right. Where have you been employed, if you could briefly describe your employment---

A (interposing) I have been employed in---

Q ---background?

[*8] A I went to work when I got out of school for my father in the face veneer business and then took that business over upon his death in 1962 and then got into the import business bringing in products from southeast Asia and started two manufacturing plants that made drawer component parts for the furniture industry and brought in teak lumber and other things for--mahogany and other things for this region.

I got in the furniture business in the '70s and became--took over the old Tomlinson Furniture facility, which we turned into Market Square, which is the second largest--it and its sister buildings, the second largest group of market buildings in the High Point market. And we just recently sold that to a real estate investment trust. And I am involved in the motion picture production business and in the hotel business. We own this particular property right here.

Q It sounds pretty busy.

A Yes.
Q It must keep you pretty busy.
A Well, I am also president of AAA Carolinas and I am the vice chairman of the School of the Arts board and involved in a lot of other board activity.

* * *

[*13] A. I know Greg Everett.
Q. And Robinson Everett?
A. I know Robinson Everett.
Q. And Dorothy Bullock?
A. Dorothy Bullock, yes.
Q. You know her?
A. Uh-huh.
Q. How do you know Ms. Bullock and the Everetts?
A. I have been involved in the television business and have been in business--we have been in business together in the television business in Greensboro and also in Wilmington.
Q. You have been in business with Robinson Everett, would that be?
A. Yes; and his mother, who is deceased. And Dorothy Bullock is the lady in the office that I would--who would communicate with me.
Q. And is Greg Everett Robinson Everett's son?
(Witness nods affirmatively.)
Q. Have you had any business dealings with him or just know him as Robinson Everett's son?
A. I just know him as Robinson's son.

Q. When did you first become involved in business with Robinson Everett and Ms. Catherine Everett?
A. In the 70s.
Q. In the 1970s; okay.
[*14] A. Or really late '60s.
Q. Once you went to vote in 1992 and found out that you were in the 12th District, did you contact Robinson Everett about this lawsuit?
A. I think I was conscious of what was going on, and I may have mentioned to him that I was pleased that that was going on when I saw him under some--I didn't go vote and call Robinson, no.
Q Did you try to keep track of the *Shaw* lawsuit?
A I very much did.
Q And how did you keep track of it?
A In the press and finding out what is going on; I have been involved in politics in North Carolina all my adult life. I have been chairman of the Democratic Party in Guilford County. I ran Skipper Bowles' campaign for governor in 1972.

I have been involved very much in what goes on politically in North Carolina and how North Carolina is put together. So I very much agreed that a suit ought to be filed because I thought the congressional district was absolutely not justifiable at all.

Q Did you talk about it with Robinson Everett other times other than just mentioning to him that you agreed with the suit?
A Well, I am sure I had conversation with him, yes, [*15] ma'am. Yes. And I told him a number of things, which are in some of the affidavits, that after we had Mel Watt as the

congressman up here, Mel Watt didn't have a telephone number in our--there was no way to contact him locally.

He was in our town twice during the first year that he was--the first two years that he was in office, one of those at the Episcopal church and one at String and Splinter Club. String and Splinter happens to be located in his district. But he made no effort at all to be much conscious of High Point, and so that made me very, very concerned.

* * *

[*16] Q You are not aware that he had a full-time office in Greensboro?

A No.

Q You are not aware that he had a satellite office twice a month in High Point?

A No. When did that happen?

Q I can't testify.

A When did--when did he have a satellite office in High Point?

Q I can't testify. I will be glad to talk to you after the deposition.

Mr. McGee: She is going to have to ask you the [*17] questions.

The Witness: Okay.

Mr. McGee: We will find that out for you.

By Ms. Harrell:

Q You are not aware that he ever had any kind of office in High Point so far as you know; is that right?

A To the best of my knowledge, no.

Q And are you aware of trips he made in connection with the furniture market every year?

A No.

Q Are you aware of any other trips to High Point during the period that he represented---

A I mentioned to you two trips, one he took to talk to some businesspeople at the String and Splinter Club, which happened to be in his district---

Q (interposing) Yes, sir.

A ---and an event at the Episcopal church. I am not--and I have been very involved in the political world of this town and he has never contacted me once.

Q Have you made any efforts to contact him?

A I don't--I can't recall that there has been any--I think there probably were some specific events that I sent some information about, but---

Q Could you tell me what you mean by events that you sent information about?

[*18] A Well, things going on; I may have sent a letter to him or something, but I don't ever recall--I don't know that I did that, and I don't know that I ever got any--any correspondence from him.

Q To the best of your memory, have you ever contacted him and asked him to respond to a problem or specifically asked him to respond about an event that you thought he should attend or anything like that?

A I just--he was not here, not anywhere near here. I just wrote him off as representing us.

Q So if he would testify or a member of his staff would testify that he came to High Point on a number of occasions for

events connected with the furniture market, something connected with the housing authority, events connected with Martin Luther King Day and other events as well, you wouldn't be aware of them?

A No. And I am very much--in that period of time very much involved in the furniture industry and in the markets.

Q And of course High Point is not in his district now; is that right?

A Currently not.

Q So it wouldn't be surprising---

Mr. McGee: (interposing) By that do you mean in the 1998 plan?

Q I'm sorry. He is not in his district under the--it is [*19] not in his district under the 1998 plan?

A Right.

Q So if he had---

A (interposing) It was in the '97 plan, I believe, but it--that never was operable.

Q So if in connection with the implementation of the 1998 plan he closed any Guilford County offices, that wouldn't surprise you; right?

A Well, if he wasn't representing Guilford County, if he had offices to close, that would be something for him to do, but I am not familiar with where those might have been.

Q Did you say--I know you said so far as you knew there was no phone number in the High Point telephone book. Did you also say so far as you could tell there was no phone number in the Greensboro telephone book or did you check that?

A I did not check Greensboro to see if it was in there; no. I mean, our book has everything in the region, but no, not in the High Point.

* * *

[*22] Q. You were never a plaintiff in the *Shaw* case; right?

A. I wasn't a plaintiff in the *Shaw* case.

Q. Were you aware that the *Shaw* plaintiffs asked the court not to rule on the 1997 plan in that case?

A. Say again.

Q. Were you aware that the *Shaw* plaintiffs asked the court not to rule on the validity of 1997 plan in that case?

A. Yes.

Q. You were?

A. I think I was.

* * *

[*30] A. I mean, I was told what was going to happen and I agreed to that.

Q. You were told this is the way it would work; is that right?

A. The way it was going to--the way it was in the process of working, yes.

Q. How did it come about that you were going to become a plaintiff in this lawsuit?

A. Because I felt very strongly that something had to be done.

Q. All right. And had you previously told Robinson Everett that you would like to be a plaintiff or were willing to be a plaintiff?

A. Yes.

Q. Had you done that before you filed your declaration in the *Shaw* suit? Do you recall?

A. I don't remember that.

* * *

[*45] Q Have you contributed to any African American candidates' campaigns?

A Yes, uh-huh.

Q Who would that be?

A Let's see; I guess I have--the senator from Orange County.

Q Would that be Howard Lee?

A Howard Lee.

Q All right.

A Let's see. I guess Senator Martin in this county I sent some to.

Q State Senator Martin from Guilford County?

[*46] A Right. I contribute to the North Carolina Senate Campaign Committee, and so I do that that way and do a significant amount for that.

Q Was that what you meant when you said you contributed to Senator Lee and Senator Martin?

A No. I have done those---

Q (interposing) You have done those directly in addition to what you contribute to the general fund for Senate campaign?

A But particularly of late Senator Hagan.

Q And have you participated actively in the campaigns of candidates for Congress?

A Got involved in Rich Preyer's campaign. I have been involved in--oh, let's see who else. I have not been as active in congressional campaigns as I have in other campaigns.

Q Would it be fair to say, then, that you have not been as active--you have not been really active perhaps by your standards in congressional campaigns other than Rich Preyer's?

A No; I am always active in some campaign, but I have not been overly active in congressional campaigns.

Q Okay.

Mr. McGee: However defined.

Ms. Harrell: However defined.

* * *

[*47] Q All right. Let me rephrase that. I'm sorry. Could you explain a little bit more what you mean when you say what the fruit of the poisonous tree means?

A What they did is they came up with a deal that stretched a congressional district almost halfway across the state and going here, there and yon, particularly take [*48] racially--heavily racially represented areas to achieve a racial purpose. And that is poisonous. That isn't the way it is supposed to be set up. That isn't the way you are supposed to do it.

Q And you are talking about the 1992 plan here; right?

A Well, that is what the '92 plan did. That is what--that is what---

Q (interposing) Describe--I'm sorry. Go ahead.

A And that is what has been going on. That is what---

Q And the 1997 plan is a different plan, is it not?

A It is still doing the same--much the same thing.

Q But it is different; right?

A Yeah, it is different. It is not quite as bad, but it is still doing the same kind of stuff. If you put Mecklenburg County down here and its tentacles move on--way on up into the piedmont, that is--and do it the way that has been done, that is poisonous.

Q And so your view is that a plan that combines different--those areas is a poisonous--is necessarily poisonous; would that be fair to say?

A Yeah, I think it is, going about that way, trying to interconnect areas that are not interconnected any other way, trying to do it solely to accomplish a racial purpose.

* * *

[*52] Q And did you refer to having homogenous groups in a district? Didn't you use the word "homogenous"?

A I was saying like a district will have a number of homogenous problems. I mean, the problems in Mecklenburg County are somewhat similar to some problems in Guilford County, but there are also problems that aren't at all like Guilford is facing. In other words, there is a homogeneity of the population group here that has got a thrust that differs from what it is down in that part of the state.

Q So you are saying that there are some differences based on geography between residents of Guilford and residents of Mecklenburg in terms of their interest and concerns; is that right?

A Yeah; as you look at all manner of different issues.

Q And are there some differences based on citizens in terms of their concerns and interests based on whether they live in inner city areas or rural areas?

A There certainly are some issues that very much differ at the inner city or rural areas. But you put that balance-- they are there within the district, so you balance those issues out.

[*53] Q So some citizens in a rural area might not have the same concerns as a citizen in the--as citizens in the urban area even in the same county; is that a fair statement?

A Let me tell you my observation running a statewide gubernatorial campaign. We are five--basically five different states. The view varies and the interests around North Carolina vary in at least five different ways by area. That goes back to where it is and what they do and how they--and the things that are the issues that come up. And so in effect what is done by this is to put parts of two states together, if my five is working.

Q What are your five areas?

A Well, the five--western North Carolina is about two. You have got two in, say, eastern North Carolina, two in western North Carolina, and two in the central part of North Carolina, at least.

Q So are you saying that it is the equivalent of five states or are you saying there are actually five separate identifiable areas?

A It is very much like five states in their--if you go to western North Carolina, it is totally different than eastern North Carolina. Our part of the piedmont is significantly--it has got--Winston, Greensboro, High Point. It has got some significant differences to Mecklenburg and Gaston County and down that way.

[*54] Q And where do you put Wake and Durham?

A Well, Wake and Durham is different, too.

Q Would you consider the east all one or would you break that up?

A Well, the east is more like one because of its topography.

Q Because of what?

A Topography and so forth.

Q So you would say the concerns of the folks who are actually on the coast would be similar to the concerns of folks in Greenville and Rocky Mount?

A Yes.

Q And the folks up in Bertie County and down in Robeson?

A Yeah.

Q And would you say the concerns of the folks throughout the western part of the state would all be similar to each other?

A They have got some significant similarities, yes.

Q So the folks in---

A (interposing) You take Asheville west, and that group up in there has got--they have got a number of different issues and things that are different for them. You take the Boone area all back to the Virginia line and all up, that is another different kind of--set of things. So that is what happens.

[*55] Q And in your view people in the inner city in Greensboro have more in common with people in the rural areas of Guilford County than they would with the people in the inner city of Mecklenburg?

A I didn't say that.

Q Oh, I'm sorry.

A No, ma'am. I said they are part of this county. They are part of what is here. Now, they may have some similarity with a similar kind of group in Mecklenburg County, but that doesn't mean that those ought to all be interconnected.

Maybe I ought to be interconnected and you interconnected with everybody that is in one particular kind of level over seven or eight counties. That is just not the way it is supposed to be. You have got a group and you are representing the group within your district, not your district and another 120 miles away another district.

Q If you would, would you look at paragraph 25 of that complaint that I think we have agreed is Exhibit 46?

(Witness peruses document.)

A Okay. 25 you want me to read? I have.

Q Could you tell me what it means to you in that paragraph of the complaint to say that the 12th District in the 1997 plan does not conform to traditional redistricting principles?

A Because they took--they just interconnected minority [*56] groups all through the central part of the state. That is what they did.

Q And that is what you say is why it doesn't conform to traditional districting---

A (interposing) That is right. That is the poison tree to do that kind of stuff.

Q And now, you say it is the same thing in the 12th District in the '97 plan as the '92 plan?

(Witness nods affirmatively.)

Q And you don't have any question about its being contiguous, do you?

A Yes. I have got a real problem--well, it is contiguous. That is what they have done. But I mean, you get down to a teeny, teeny thread just to make it kind of work.

Q Well, what do you call a teeny thread?

A Well, probably one precinct through--one precinct line through a county.

* * *

[*76] Q How have your rights as a voter been abridged? Do you believe that your right as a voter has been abridged--your rights as a voter have been abridged?

A I think I have been put in--when it was the 12th District, I have been put into a district that doesn't fairly represent me and our region and I think my rights have not been properly looked after. I think it has been gerrymandered for a reason, a racial reason, and I don't think that ought to be happening in representation in this region right here.

Q You haven't been denied the right cast a ballot, have you?

A No.

Q And have you cast a ballot each time for Congress?

A Yes.

* * *

[*78] Q You yourself live in a very urban area, don't you?

A Do you mean where my residence is?

Q Yes, sir.

A We live in a high rise, triple mixed use condominium building, which is part showrooms, part offices, and 18 condominiums.

Q And you live in High Point?

A High Point.

Q Is that in the central area of High Point?

A Yes. It is the tallest--about the tallest building in High Point.

Q And if High Point is considered a city, you live in the center city; is that right?

A Right.

Q And so in the 12th District in the '92 and '97 plans, you are grouped with other urban residents?

A I am grouped in my precinct with mostly minority [*79] people.

Q And is---

A That is what my precinct is.

Q Right. I mean, your precinct happens to be more minority voters than---

A (interposing) Almost all---

Q ---white voters; is that right?

A Almost all minority.

Q And so you and the other members of your precinct all live in the city; is that right?

A Yes. Oh, yes. Yes, ma'am.

Q So you are grouped with people who live in the same area that you live in; is that right?

A Yes.

Q You weren't pulled in from an adjacent area---

A (interposing) No.

Q ---as a land bridge or whatever?

A No.

Q You are grouped with a group of people who live in the city; is that right?

Mr. McGee: Objection as to the form.

Q You are a resident of the inner city of High Point?

A Central.

Q Central city of High Point?

A Central city.

[*80] Q And you are grouped with people who live in the nearby area in the central city of High Point; is that right?

A Yes.

Q And when you say that most of the people who are in--from High Point who are in the 12th District are minority, you are living in an area which has more minority residents than white residents; is that right?

A Yes, ma'am.

[*64] Q Just in terms of how the computer operates, as you draw these maps on the computer, there is a screen of the [*65] map. I mean, on the screen there is a map; is that correct?

A That is right.

Q And it can be of a relatively small area, a district, or the whole state?

A Right.

Q And given the size of the screen if it is the whole state rather than a single district, it is a little bit harder to discern; would that be true?

A That is true.

Q How big is the screen, if you recall, approximately?

A I would guess it is about a 15 to 17 inch screen.

Q And all the screens were the same. You didn't have some computers with bigger screens, did you?

A Right.

Q Now, on that screen did you have to scroll in information or was it all there at the beginning--I mean, you just look up and there it is--as to percentages, let's say racial percentages?

A I think you would have to put in a formula to get the screen to actually display racial percentages. You could always put your mouse on a particular census block, precinct, possibly even county, click on it, and get information for that unit on population and racial breakdown.

Q Could you do it with respect to a district, click your mouse and get the percentage in a particular district, if you [*66] recall?

A I don't recall that you could do that. You would have to--my recollection is you would have to run a report to get that information for the district, although there was some cumulative information on the district on the side, as I recall, the side of the screen.

Q I see. The cumulative information, do you remember what that was? Was it--did it include race?

A To the best of my knowledge it did, although I don't recall whether it showed it as a percentage or an actual number or both.

Q And isn't it true that it did not to the best of your knowledge include the results of the three elections, the elections in 1988 and 1990?

A To the best of my recollection, that was also totaled cumulatively for the district.

Q All of that was there, to the best of your recollection?

A As I recall.

Q Now, with respect to the middle portion of the map in Exhibit 34, there is a line. And I don't know how to characterize it exactly. It seems to run from Mecklenburg County in a northeasterly direction. Can you tell us what relationship, if any, that might have to any particular congressional district?

[*67] (Witness peruses document.)

A It appears to be the 12th District.

Q And by the way, what appears to be the 1st District? Is that the northeasterly part of the state not touching the ocean? Is that the 1st District in this plan?

A I believe so, and I believe that the part touching the Atlantic is the 3rd.

Q With respect to the counties that are traversed by the 12th District in this plan, do you recall what those counties are and how many?

A It looks like Guilford, Forsyth, Iredell, Rowan, Cabarrus, and Mecklenburg.

Q So in that one Cabarrus is included?

A It appears to be.

* * *

[*71]Q If I ask you what is meant by the Greensboro black community, do you have any idea of what I would be talking about?

A I am not familiar with the Greensboro area, but I would assume those neighborhoods where there are higher concentrations of minorities, of blacks.

Q And by the same token, if I said the High Point black community you would have the same---

A (interposing) Right.

Q ---interpretation, or the Winston-Salem black community?

A Right.

Q Or the Charlotte black community?

(Witness nods affirmatively.)

Q Now, with respect to the 1997 plan that was ultimately adopted, isn't it true that it joined the Greensboro black community, the High Point black community, and the Winston-Salem black community at the north end and at the south end the Charlotte black community?

Mr. Stein: Objection.

A It does join what I would see as those communities. Whether it pulls them--the entire black community in, I don't [*72] know.

Q But a substantial amount of the black community in Greensboro? I am talking now about the 1997 plan.

A To my knowledge, yes.

Q A substantial percentage of the black community in High Point?

A To my knowledge, yes.

Q A substantial percentage of the Winston-Salem black community?

A To my knowledge, yes.

Q A substantial percentage of the Charlotte black community?

A To my knowledge, yes.

Q Now, earlier you used the term "land bridge." You used it; I didn't. Isn't it true that the 12th District as constituted in the map being shown here and the one that was enacted--isn't it true that that district as formed contains a land bridge connecting the Charlotte black community with the High Point black community and with the Winston-Salem black community and with the Greensboro black community?

A It is true---

Mr. Stein: (interposing) Objection.

A It is true that those are connected, but that doesn't fit my definition of a land bridge.

Q And is that because it is wider in the connecting area [*73] than your definition of a land bridge?

A It is--no, it is because the full precinct is used.

Q Now, if I told you that at least ten points that is only one precinct wide, would that in turn change as to whether it was a land bridge?

A Repeat that again; I'm sorry.

Q If I told that in at least ten places the 12th District as enacted was only one precinct wide, would that change your definition?

A No.

Ms. Harrell: Objection.

Mr. Stein: Objection.

Q So it would have to involve a splitting of at least one precinct or how many precincts before it became a land bridge?

A I don't know of a magic number that it would have to split. It is really more in the--if there is one split, it is more in the context of looking at why the particular precinct was split. If it was split solely to bridge two, I would say that would meet my definition of a narrow land bridge.

Q Do you mean if it were split solely to get from point A to point B?

A Right.

Q Now, in respect to the formation of a congressional [*74] district, if it were the intent of the persons who drafted a plan to join the Greensboro black establishment me--or pardon me, I'm sorry--the Greensboro black community, pardon me, the Winston-Salem black community, and the High Point black community on the one hand with the Charlotte black community on the other and if the only way to do it was by linking certain precincts, the only way to do it and maintain the one person one vote criteria, would you say then it was a land bridge?

Ms. Harrell: Objection.

A No.

Q So even if the only way to combine them was to route something in a particular way, that would not make it a land bridge in your view?

A Not alone.

* * *

[*75] Q (interposing) All right. Let me ask you another question. Do you know whether or not Precinct 77 in Charlotte was split so that the northern part of that precinct is in the 12th District and the southern part is in [*76] the 9th District?

A It is my recollection the precinct was split to keep District 9 contiguous.

Q Now, within your definition, isn't that a land bridge between the east and the west part of the 9th District?

Mr. Stein: Objection.

A That would be within--sorry; that would be within my definition.

Q So there is at least one land bridge that was drawn in creating the 12th District in order to maintain the contiguity of the 9th District; correct?

Mr. Stein: Objection.

A That would be my opinion.

* * *

[*112] Q Did Representative McMahan make any comments to you with respect to his perception as to the

12th District being proposed by Cooper after it had been drawn in a form containing parts of Charlotte, parts of Winston-Salem, parts of Greensboro, and parts of High Point? Did he talk to you about that particular plan, that configuration?

Ms. Harrell: Objection to the form of the question. If you can understand it, go ahead.

A Did he talk to me about the plan or that 12th District?

Q The 12th District is what I am focusing on.

A At some point he indicated that he felt that the portion of--I believe it was Winston-Salem that we had left out--he would go ahead and put that back in because it was part of the same urban areas as Greensboro and Charlotte.

Q Do you remember whether or not that was predominantly black, that area? You said he would take--you say he would put back in. Maybe I better start with another question. When you use the term "put back in," it implies that it was once in, taken out, and you are putting it back in. Had it [*113] been in before in some plan?

A I don't think it had been in the House plan that he worked on. It was obviously in one of Grady's plans and I think he had seen that, but I don't think he had proposed putting it in at that point. So instead of saying "put back in," I meant to say "put in."

Q Okay. I just wanted to make sure on that.

A Right.

Q Do you remember what precincts was contained there?

A I don't know.

Q Do you remember anything about the racial configuration of that area?

A Not offhand.

Q Did you ever discuss with him the circumstance that to a considerable extent Charlotte was split on racial lines?

Ms. Harrell: Object.

Q That is, that the number of predominantly black precincts placed in the 12th District from Winston-Salem--I should say Charlotte--from Charlotte was much greater than the number of such precincts placed in the 9th District?

Ms. Harrell: Objection to the form of the question; if you can understand it, Linwood, you can go ahead and answer.

A I don't recall having any discussion with him about what was inside and what was outside.

[*114] Q Nothing about who was in, who was out, African American or otherwise?

A I don't think we looked at that on a county basis. He would have been aware of the overall district's breakdown as far as racial percentage and as far as its elections and registration. But I don't recall us doing that for Mecklenburg County. Now, he did--and I don't recall--he did have some interest in certain precincts in Mecklenburg County that he was trying to keep in Sue Myrick's district, I believe.

Q How about with respect to--and were any of them predominantly black?

A To the best of my knowledge, they were not. The two that I can recall are in the northern part of Mecklenburg County, up at the neck of Mecklenburg County.

Q Was that what might be termed the 77 corridor up toward Statesville, or was that more on the 95--pardon me, 85 corridor going over toward Concord, or do you recall those precincts?

A I mean, I don't recall. They are precincts that stretch across from the east to the west side of Mecklenburg County up at the neck of Mecklenburg County.

Q They were from the east to the west?

A One precinct stretches all the way across, yeah.

* * *

[*118] A Yeah. I believe one of the precincts may be now in the enacted 9th District and one in the 12th. But I don't have a precincts map in front of me and I don't recall for certain what they were. I just know they were in north Mecklenburg.

Q With respect to any of the other counties besides Mecklenburg did you and Representative McMahan discuss the nature of the splitting insofar as it pertained to any racial concentrations?

A No; I don't recall discussing splitting as it relates to racial concentrations. We at some point early on took what the Senate had on District 12. And I do not know what discussions Representative McMahan had with Senator Cooper about that.

We did make some adjustments to that district but they were mostly to try and get Cleveland County whole because the Senate plan had split Cleveland County. So we had to make some adjustments in District 12 to get the population in District 9 worked out so that we no longer had Cleveland split.

Q So this discussion affected whether or not a portion of Cleveland County might be included in the 12th District?

[*119] A No; it was a discussion of splitting Cleveland between the 12th and the 10th--I mean, excuse me; the 9th and the 10th.

Q Oh, the 9th and the 10th, not---

A (interposing) And the House was trying to put it all in the 9th.

Q So there was no plan that you are aware of by anybody to put Cleveland--to try to extend the 12th District to include Cleveland County?

A No, no, no, no.

* * *

[*159] Q Now, with respect to urban setting, would it be your view that a white citizen living in Winston-Salem in the--well, the district other than the 12th District right across from a black citizen who is in the 12th District is also urban? Is there any difference in being urban based on race?

Ms. Harrell: Objection to the form of the question; if you can understand it, answer it.

[*160] A I don't understand.

Q Okay. In determining homogeneity as it relates to living in an urban setting, is there any difference between a white and a black living in the urban part, the center part, of Greensboro or Winston-Salem or any of these other cities?

Ms. Harrell: Objection; if you can answer it, go ahead.

A I wouldn't consider a black in one district and a white in another to be distinguished based on whether they were urban or not.

[*25] Q Now, look below there. "The population in 12 has homogeneous interests comprised of many citizens living in an urban setting." Do you remember any sort of comment by yourself to that effect?

A Again, I do recall that that was one of the factors **[*26]** that we considered was trying to put people of common interests together in a district, not just this district, but other districts.

Q But this is particularly with respect to District 12?

A Yes, it is.

Q And by homogeneous what do you mean?

A Just that they function together, they have common interests, they are, you know, basically urban livers, live in an urban setting is primarily what we were trying to--you know, what we were talking about.

Q Let me ask you this with respect to urban versus rural. Let's take a look at say Rowan County. Would you consider Rowan County urban or rural?

A Probably both.

Q And what do you mean by that?

A I would consider Salisbury to certainly have some urbanites living there. I certainly would consider there being some rural areas outside of Salisbury in that county.

Q How about Iredell County?

A Iredell, Statesville---

Q (interposing) Urban or rural? Same thing?

A ---Mooresville, you know, would be some of the--but not to the extent that Greensboro, Winston-Salem, High Point and Charlotte would be considered urban.

Q How about--you may not know these areas that well, but [*27] let me show you what purports to be the North Carolina congressional plan for 1997 now and ask you to refresh your recollection there.

A Yes, sir.

Q With respect to the southwestern corner of Forsyth County--I'm sorry; the southeastern corner, I beg your pardon--up there between High Point and Winston, would you say it is urban or rural?

Ms. Harrell: I am going to object. At least let the record reflect that you are showing him a map that has nothing but the names and boundaries of the counties and it has no indication of where any cities or highways or any other characteristics are. But to the extent you can answer that, Representative McMahan, please go ahead.

A Well, I do think that in Forsyth and Guilford the intent was to pick up basically Democratic voters in the urban areas. And so that is what this map--I assume those are two areas in those two counties that we did pick up.

Q Well, what I am trying to figure out is from your testimony how much of Forsyth is urban. Is it all urban or is part of that rural?

A Again, we are basically picking up Winston-Salem, the primary city of the county of Forsyth---

Q (interposing) And Winston-Salem---

A ---and also Greensboro in Guilford.

[*28] Q And so Greensboro and Winston-Salem would be urban?

A That is my opinion; yes, sir.

* * *

[*34] Q Now, to the best of your knowledge, with respect to Charlotte now, were all of those areas put into the 12th District in the plan in---

A (interposing) Judge Everett, I do not know. I did not look at specific precincts. Again, we went into Mecklenburg and modified it somewhat from what the old plan already included. But as I recall, we were not picking up [*35] minority voters in Mecklenburg. We were picking up more of the voters in the southern part of the county in order to balance the numbers out.

Q When you say balance the numbers out, what do you mean in that regard?

A To be able to get the 550,000 per district.

* * *

[*36] Q So your starting point basically was to change 12, which had been held unconstitutional?

A Yes, sir.

Q Now, there was a District 1 in the earlier plan, the 1992 plan, which is probably over here.

(Map shown to witness.)

Q Do you remember seeing that 1992 plan, looking at it?

A I believe that is it, sir. Yes, sir; it looks like it.

Q And that stretched almost from Virginia down to South Carolina?

A Yes, sir, it did.

Q And did you form any belief from the advice you received and otherwise whether that district as it existed in the 1992 plan was unconstitutional?

Ms. Harrell: I am going to object to the extent you are asking him for a legal conclusion.

Mr. Everett: I am asking him for his belief.

Ms. Harrell: Go ahead.

A I was not familiar at all with the process prior to being involved in '97. But yes, when I looked at that plan at that time and I looked at District 1 and District 12, District 12 had been declared unconstitutional. In my [*37] nonprofessional, nonlegal opinion, the way it was shaped in District 1 it could be also interpreted as being unconstitutional.

Q So then in your work as chair and work with Linwood Jones was the starting point to try to clean up--change District 12 and District 1? Was that sort of the---

A (interposing) Well, that and also to look at all the districts to see if we could reduce the number of counties that were divided, reduce the number of precincts that were divided, and make it a more compact plan across the state was our real--our goal. But yes, sir, District 12 and District 1 that were the two that seemed to be the most odd shaped got primary consideration.

Q So in a sense that was the starting point, and you had certain factors that you were considering?

A Again, looking at it in total context as I just explained it, again, they were certainly looked at and were a big part of the changes in the plan that governed the 97 plan.

Q What were the factors--you mentioned some reference to telling Linwood Jones of factors to look at. What were those factors that---

A (interposing) I think two or three of the primary factors--one was of course to try--we had to maintain the balance that existed, the six-six balance. That was first [*38] and foremost. Senator Cooper and I sat down early on and talked about a few of the things that we needed to have in order to get both sides to agree and one was to maintain a six-six balance.

We also wanted to try to make as geographically compact districts as possible dividing the fewest number of counties and no precincts if we could help it. We also wanted to try to put people of common interest together. We also looked at the--let's see; I am trying to think of other factors that were being considered.

Certainly in District 1, you know, the idea was to try to make it as compact as possible, but to try to also make sure that it was racially fair. And that would also apply to District 12. We did have, you know, the minorities in the House on both sides that we had to deal with and get everybody on board.

And a big consideration that we had to deal with, of course, was the fact that we had a Democratic Senate and a Republican House and to try to come up with a plan that both sides would agree on. It had to be fair to both sides, and then also to protect the incumbents. That was a huge--that is the one I was trying to remember. That was a huge consideration. And so it was a combination of all those things that were the instructions I gave Linwood to try and draw the map.

[*39] Q When you say racially fair, what do you mean?

A Just that minorities could have a chance to have fair representation.

Q Well, when you say fair representation, does that mean representation by people of their own race?

A Well, it could be both. I mean, obviously Democrats--it could be Democrats as well as people of their race is the way I would interpret it.

* * *

[*40] A Again, there were a lot of factors that had to be considered. In a nonprofessional, nonlegal way my understanding was that we--that District 1--that in order to get it precleared that we would probably need to have at least one majority minority district.

My understanding, again, was back in--at the time we drew the plan in '92 we were told we needed to have two minority majority districts and that was what really led to 12. That was my--again, just what I understood the process to be when we got started.

Consequently, we looked at 1, and race was a factor, because--not that it was necessarily the predominant factor, but it was a huge factor in 1, because it was my understanding we did still need to maintain one minority majority district.

Q So in other words---

A (interposing) And we could do that in the northeastern part of North Carolina very easily and make it a lot more compact. And then looking at the other district, of course, then it was to my judgment that it not necessarily [*41] did not need

to be majority minority, and that was not in any way the primary factor for 12.

Q So then was it your belief that if you had a plan that did not have a majority minority or majority black district in the northeastern part of the state, it would not receive preclearance and all effort would be wasted?

A We certainly--we understood we needed to get preclearance, and that was a factor certainly in getting that. Whether it would be totally denied, I did not know for sure until the Justice Department acted, but certainly felt that it would enhance the preclearance process if we had one minority majority district.

* * *

[*46] Q Now, there came a time when you-- well, let me first ask you another question. In some of your statements you have referred to racial fairness. What do you mean by racial fairness?

Ms. Harrell: I am going to object unless you want to put it in context.

Mr. Everett: Okay; sure.

By Mr. Everett:

Q Let's say, for example, in the floor debate on March 26 you speak of trying to agree upon a plan based on geographic compactness, racial fairness. What is racial fairness to you in that context? What do you mean?

[*47] A Well, again, that the members of the minority race would be adequately represented.

Q And in construing what is adequate representation, does that involve the race of the persons who are doing the--who are the representatives?

Ms. Harrell: Object to the form of the question. If you can understand and answer that question, go ahead.

A Certainly District 12, you know, was represented by a minority and he was an incumbent. And you know, that certainly was taken into consideration, that we did have an incumbent there.

And as I mentioned earlier, you know, obviously we had to deal with the minority members of the legislature and try to get all parties in the legislature on board and approve a new plan. You know, it was--you know, it was necessary to make sure that at least they were--could be fairly represented, you know, in the election process. So that is how I would answer that.

Q So at the time of the '97 plan there was an incumbent, Mr. Watt, Representative Watt?

A That is correct.

Q An African American?

A That is correct.

Q And basically if he were not protected so that he would be reelected, the members of the General Assembly who **[*48]** were African Americans would be upset; is that about right?

Ms. Harrell: Object to the form of the question.

A It was certainly a part of the discussion, one factor of many, many factors.

Q I mean, isn't it true--and you have only been involved in politics a short period of time, but isn't it true that in every

way it was represented to you that unless it was almost assured that Representative Watt would be reelected that there would be some real problems with the minority members?

Ms. Harrell: I am going to object to the form of the question. I am also going to object to the extent that when you say it was represented to him you are asking for confidential communications from legislators with any privilege or anybody who might have an attorney-client privilege. But otherwise if you can understand and answer the question---

A (interposing) Judge Everett, it was no different than all the other incumbents. You know, whether a minority or not, Republican, Democrat, in my opinion it was--you know, it was the same way. We certainly were--it was very important for us to get--in order to get the members of the legislature on board to protect the incumbents that did serve in the districts that our representatives served in.

* * *

[*78] Q Now, I am going to show you the same map, and I **[*79]** believe this is in gray, what purports to be the 1st District. And I am just going to ask you to look at it. Is it your testimony you think that is geographically compact?

A As compared to the '92 plan it is very geographically compact.

Q Now, if there had been no 1992 plan, would you say that it was geographically compact?

Ms. Harrell: Object to the form of the question; asking him to speculate. If you can answer it, go ahead.

A In my opinion, there are some other districts that do have the same geographical compactness that District 1 does, so yes, sir, I consider it to be a geographically compact plan.

* * *

[*93] Q With respect to preserving the cores of the prior districts, what did you mean there?

A We felt--we being Senator Cooper and I, the two chairs of the committees--that the best way to get a plan that both sides could agree on, one of the things we needed to do was to try to make the fewest number of changes in the plan as possible and obviously also for the purpose of trying to--the voters, in order to try not to disturb, you know, the voting public any more than we had to as far as them having to move to new districts or new precincts from what they have already been in.

So this was something that we decided in this plan that we would try to--you know, obviously protecting incumbents was a big part of it, as I said earlier in my testimony, and also to make the fewest number of changes in the new plan.

* * *

[*98] Q Did you go up to Washington?

A Yes, sir, I did.

Q And that was to meet with the Civil Rights Division people?

A It was at the Justice Department. I am not sure who was---

[*99] Q (interposing) Okay. Who went with you and when did that trip take place?

A. I do not recall when it took place. As I recall, there was a representative from--Eddie Speas was with us, I believe, from the Attorney General's Office, and Senator Cooper and myself. And it seems like there may have been one--maybe Leslie Winner. I am not sure if she was there or not. I think she might have been. That is all I--oh, and Linwood Jones; I'm sorry.

Q And how about Gerry Cohen?

A I do not remember.

Q And about when did that take place?

A I honestly don't remember the date.

Q It was after the plan was enacted?

A Yes, sir, it was.

Q And what did you all say to the folks up at Justice, whoever they were?

A The plan had been presented. They asked us questions about the plan.

Q And what were the questions they asked you?

A I don't recall specifically what the questions were.

Q Did any of the questions relate to race?

A As I--one question, I believe, or I know was the--I remember them asking me why did the majority of the blacks vote against the plan. And that was a question they asked me [*100] specifically.

Q And that was against the 1997 plan?

A Yes.

Q The majority of blacks where?

A In the House.

Q And what did you say in reply?

A I told them I was very surprised because I had worked with the minorities all the way through the process thinking that, you know, they were on board. And I really didn't know the answer to that other than they had a plan they preferred and they weren't--you know, they weren't totally satisfied with our plan and tried to offer an amendment for their own plan, but that is to the best of my recollection what I remember.

Q When you speak of working with the minorities, who are you referring to? I gather you were---

A (interposing) The minority members of the--primarily the minority members of the congressional redistricting committee.

Q Can you identify some of them by name, if you recall?

A It was just several of the members on the committee. I can identify, I believe, who actually were members of the committee: Representative Toby Fitch, Representative Michaux, I believe; he certainly had some comments about the plan. Representative Blue was part of the committee. Those **[*101]** are the three that I remember as---

Q (interposing) Representative Blue, who had been Speaker of the House when the---

A (interposing) Yes.

Q ---1992 plan was adopted?

A I don't know about that, but yeah, he was a former Speaker of the House.

Q And when you say you felt they were on board, why did you feel they were on board?

Ms. Harrell: Object to the extent that it calls for any statement made in an nonpublic forum by any of those House

members as they have not waived their legislative immunity. Otherwise, Representative McMahan, if you can answer the question, go ahead.

A I don't--you know, they were part of the committee. And as I recall, they probably voted for the plan in committee. I really don't remember, Judge Everett. I just felt like when it came out of committee that we had their support. And as it turned out, on the floor they decided to vote against it. That is about all I recall.

* * *

[*109] Q What state interest, if any, or governmental interest, if any, were there in drawing the 12th District as it was in the 1997 plan?

Ms. Harrell: Objection to the form of the **[*110]** question; but Representative McMahan, if you can answer, go ahead.

A Judge Everett, I don't recall as part of my deliberation that the state was really the big issue. It really was the issue of Senator Cooper and I trying to work together, because our leadership of both bodies wanted the legislature to do this in lieu of letting the court do it. And we were trying to make our best effort to develop a plan that we could get approved by the General Assembly. And that was the primary goal that we had and, you know, our plan was based on that.

Q You weren't trying to do it to avoid a lawsuit from somebody else?

A No, sir; not as I recall.

[This page intentionally left blank.]

DAVID PETERSON, PHD DEPOSITION (EXCERPTS)

[*4] Q Dr. Peterson, my name is Douglas Markham, and I am here today in association with Judge Robinson Everett, who represents a group of North Carolina citizens who are opposed to a set of congressional districts which in our view reflect a policy of segregation. Have you been retained as an expert in this case?

A I have.

Q And by whom?

A I have been retained by the State of North Carolina.

Q How are you being compensated?

A I send in bills monthly and I get paid in return.

Q And at what rate?

A My hourly rate is $335 an hour.

Q And is this your customary and usual rate that you charge for analysis or presenting testimony?

A Yes, it is.

* * *

[*8] Q Do you have a sense on how many occasions in your lifetime you have testified in deposition?

A Perhaps 40 times.

Q And how many occasions have you given testimony in court?

A Total?

Q Yes.

A Perhaps 35 or 40 times over the last 25 years.

Q Have any of those occasions involved redistricting?

A No.

Q Have any of those occasions involved segment analysis?
A No.

* * *

[*9] Q In what subject is your bachelor's of science degree?
A Electrical engineering.
Q And in what subject is your master's?
A Electrical engineering.
Q And your doctorate?
A Electrical engineering.
Q What is the training which qualifies you to conduct and offer opinions on segment analysis of the external boundaries of a congressional district?
A I am an applied mathematician.
Q How are you currently employed?
A I am currently retired from Duke University's statistics department, and I am president of PRI Associates, a statistical consulting and software development firm.

* * *

[*10] Q What is the purpose of this institute of which you are president?
A It is a statistical consulting and software development firm.
[*11] Q And what percentage of its activities are related to preparing to testify for trial and doing analyses related thereto?

A Slightly more than half.
Q And how long has that institute operated?
A It is not an institute. It is a corporation.
Q I'm sorry.
A A C corporation.
Q And how long has it been---
A (interposing) And it was incorporated in May of 1979.
Q When you were retained with respect to this case, by whom were you first consulted?
A My first contact was with Edwin Speas.
Q What was the nature of the assignment you were given?
A Mr. Speas asked me if there was any way that I thought one could address the issue of whether--whether one could address the issue statistically of whether race had been the predominant factor in the drawing of the boundaries of the 12th District.

Ms. Smiley: And we will object to any further questions that might ask Dr. Peterson to talk about conversations with Mr. Speas.
By Mr. Markham:
Q Were you asked in any way to prepare an analysis of whether race in fact was predominant in the construction of [*12] the congressional district?
A I don't understand the question.
Q Was your assignment limited to an analysis of the relationship of the external boundaries to the issue of whether race predominated or some other purpose predominated in the construction of the district?

A No. The question was is there some way of addressing the issue statistically of whether race was the predominant factor in the drawing of the boundaries of the 12th District.

Q In your mind is that question in any way different from whether race is predominant in the construction of the district?

A I am not sure. The way I prefer to phrase the question is whether race was the predominant consideration in the construction of the 12th District or the construction of the boundaries of the 12th District. I don't think it matters whether you use one phrasing or the other of the two which I have just given.

* * *

[*13] Q Is it your conclusion that party is a better explanation than race in the construction of the external boundaries of congressional districts of the 1997 plan or that it is essentially an equal explanation?

A My conclusion is that although there is a correlation between the racial composition of the populace and the boundaries of the 12th District, there is also a correlation between the political affiliation of the people in the 12th District and nearby and the boundary taken by the district and that of the two correlations the slightly stronger one is with political affiliation and not with race.

Q Is the degree of difference in the explanatory value of the data sufficient to permit you to say that one is a better fit than the other?

A Yes.

Q So these differences are in your view significant?

A I am not sure how you are using the term "significant." It is simply the case that one correlation is larger than the other.

Q Does your analysis provide an answer to the question [*14] of whether a significant number of persons are placed into or excluded from the district on the basis of race?

A It doesn't really address that issue, nor does it address the similarly phrased issue with respect to party affiliation. All it does is measure the correlation between race and the boundary and the correlation between party affiliation and the boundary and observe that of the two correlations that with party affiliation seems to be somewhat stronger than that with race.

Q Do you have any direct knowledge concerning the motivation of members of the legislature who shaped the plan?

A Not direct in the sense that I have spoken with any of the legislators.

Q And what is the source of your knowledge?

A What knowledge?

Q Did you have any indirect information respecting the motivations of legislators?

A I am told that the legislators, at least some of them, have said that in drawing the boundaries they considered party affiliation and not race. But I have not in any way relied on that information. My analysis is purely objective.

Q And have you been told what measure of party affiliation these legislators indicated was relied upon?

A I may have been told. I don't remember at the moment what I was told.

[*15] Q Have you reviewed any of the materials from the Section 5 submission of the North Carolina legislature to the Department of Justice?

A I am not familiar with that material by that name.

Q Have you reviewed any materials that are provided to the Justice Department in connection with seeking preclearance in a congressional districting plan?

A Not by that name.

Q Have you been provided any information that with respect to Congressional District 12 that someone moved the Greensboro black community into Congressional District 12 and then later removed 60,000 persons from the district?

A I am unaware of that.

Q And if you were aware of that information and assuming its accuracy, would that affect your analysis in any way?

A No.

Q Have you done or attempted any segment analysis similar to that reflected in the data before you using the boundaries of either the 1st or the 12th Congressional District from the 1992 congressional district plan?

A No.

Q So do you have any basis to offer an opinion in any way as to whether the external boundaries of the 1st or 12th Congressional Districts in that plan were predominantly racial or predominantly political in motivation?

[*16] A I have no opinion on that.

Q On how many other occasions have you performed some sort of segment analysis in your work?

A I have never done an analysis exactly like this, but it is rather common in my practice to start with a fact situation and tailor an analysis to that--to the question of interest in that fact situation. So the general approach is one that I have used lots of times. The specific result of that approach in this instance is unique.

* * *

[*16] Q Do you know whether segment analysis is a standard, recognized procedure in any scientific field?

A It is certainly common to identify atomic entities and examine them individually and then aggregate the results of those individual instances to see whether there is an overall statistical pattern. That is really the essence of statistical analysis. In this particular case the atomic pieces were segments of a boundary. I am unaware of anyone who has done exactly that kind of analysis in the past.

Q Have you used this sort of analysis, this atomic [*17] analysis, to offer an opinion respecting whether--the intent behind an action?

A I'm sorry; is the question complete?

Q Yes.

A I don't understand it.

Q Have you used this sort of atomic analysis using subparts of the data and then evaluating them in the method that you have described as a way of establishing the intent of some person or somebody?

A Only indirectly; in employment discrimination litigation it is fairly common to examine atomic circumstances in which

an employer made a decision and then to aggregate the results of those individual decisions to see whether there is a pattern of the employer in instance after instance making decisions which are adverse to the interest of some particular protected group from which one, typically not the statistician, but the trier of fact, may be inclined to infer intent.

Q Do any of your writings, either your newsletters or your academic writings, deal with some sort of segment analysis?

A They certainly deal with atomic analysis, but not specifically segment analysis. That is rather particular to the circumstances of this case.

* * *

[*18] Q Is it possible that this same sort of segment analysis would indicate a predominance of party over race even for a district which a court may have already invalidated under the conclusion that race was indeed the predominant factor?

A It could happen, yes.

Q Have you conducted any analysis concerning issues that relate to voter cohesion by race in North Carolina?

A No.

Q Have you conducted any analysis concerning polarization of voting by race within North Carolina or the absence of such polarization?

A Only to the extent that I have examined the correlation between race and affiliation with a Democratic party, but those results are reported in my two affidavits.

Q But with respect to voting behavior in terms of election contest results have you conducted any such analysis?

A I would just repeat my earlier answer in response to that. To the extent that I have, the results are reflected in my two affidavits.

Q And you are referring to the political party affiliation data as including the election contest results as well [*19] as the registration by race and other similar data?

A Yes. I have used four different measures of party affiliation and I have referred to them collectively.

Q Have you analyzed the question of whether or not Congressional District 12 as drawn in 1997 maximized Democratic strength within any particular region of North Carolina?

A No.

Q Did you conduct any analyses or begin any analyses which are not included in your report or reflected in its results?

A On that issue?

Q No; on any issue that relates to redistricting in this *Cromartie* assignment.

(Pause.)

A Not that I can recall; this was our study.

Q So there is no instance in which you began a process and found it wasn't fruitful or properly illustrative and just dropped that analysis?

A No; we don't do that.

Q And other than the segment analysis, is there anything else you relied on in reaching your conclusions?

A No.

Q How large a difference in values is necessary, for example, with respect to partisan affiliation before you

[*20] consider that difference important enough to be helpful in this analysis?

A I am not sure I understand your use of the term "helpful." All I did was to develop a measure of correlation between where the boundary of the 12th District runs and the racial makeup of the populace and then apply that same measure to the political affiliation of the same populace and note which of the two correlations tended to be stronger.

* * *

[*38] Q And you indicated earlier that third party candidates, it was your understanding, were discarded in the analysis and the data was just removed?

A We discarded them.

Q Okay.

A So that anytime we report a precinct as being say 40 percent Republican, it is a fair inference that by that same measure it is 60 percent Democratic.

Q And you would have done that both respect to party registration data and with respect to election contest data?

A Yes.

Q If there are mistakes in the accuracy of the data, could that affect the degree of difference of the ultimate conclusions of your analysis?

A It could, yes.

Q Could it affect whether there is a difference?

[*39] A It could, yes.

Q And it could therefore affect the direction of the difference?

A Yes, it could.

Q Did you or anyone in your organization make any effort to verify the accuracy of the data?

A No, not beyond making sure that we had read it correctly.

* * *

[*39] Q (interposing) Well, let me rephrase my question. With respect to the population data, total population and voting age population per precinct, do you know whether or not the State of North Carolina modified data from the U. S. [*40] Census Bureau in preparing the data which they provided to you in Exhibits 21 and 22?

A I don't know.

Q And if that data were modified in error, could that affect the accuracy of your results?

A It could, although if the data are erroneous and the data are in fact what the legislature relied on in making its decision, it might be that even erroneous data would not affect the conclusion that I draw.

Q I would like to draw your attention to observation 198, which I believe is in Exhibit 22. I believe that is reflected on page 47 in the upper right-hand corner; is that correct?

A Yes.

Q Can you tell me how many black registered voters in observation 198, segment 199, are shown for the external precinct, the outside precinct?

(Witness peruses document.)

A My copy is a little hard to read, but it looks like it might be 93, but it might be 90 or it might be 98.

Q And how many black persons in total are there for that observation?

(Witness peruses document.)

A It looks like there are 60 recorded here.

Q So a precinct with 60 black persons generates a black [*41] registered voter population of 90 or greater?

A That is what it looks like, yes.

* * *

[*42] Q I'm sorry; can we focus on the internal precinct?

A Okay.

(Witness peruses document.)

Yes. In the internal precinct the data show 44--no, sorry; the data show 61 blacks in total but 132 registered black voters in lines 149 and in line 150 as well.

Q And the number you began to give, the 44 number, would be the number of adult blacks who reside in that precinct according to the data.

A Yes.

Q Is that correct?

A That is right.

Q In Exhibit 21 is there a listing of precincts for which you lacked full data?

(Witness peruses document.)

Q Sir, can I draw your attention to page 7?

[*43] A Yes.

Q Were you aware at the time you prepared your analysis that you were missing full data with respect to these observations, these five observations?

A Yes.

Q What effort, if any, did you make to obtain complete data?

A I don't recall whether we specifically asked about these data or not. We had several conversations with the people who supplied us with the data. But my understanding is that we have all of the data that are available.

* * *

[*44] Q Do you know whether the--in your footnote--let me just start a different way. In your footnote in your first affidavit---

Ms. Smiley: What exhibit number is that?

[*45] Mr. Markham: That is Exhibit Number 19, page 3, footnote 1.

By Mr. Markham:

Q You make a mention of some special circumstances which relate to Davie County?

A Yes.

Q Can you explain to us what those circumstances are?

A I am not sure what there is to say beyond what is said in the footnote.

Q Did you make any effort to obtain data that was missing from the State with respect to Davie County?

A No. We just used minor civil division data.

Q Do you know whether the minor civil division data corresponds to the precincts for that county?

A As I sit here, I don't.

Q Did you calculate the data for Davie County with respect to election results or were these figures that were supplied to you by the State?

A All of the figures were supplied to us by the State.

Q Can you identify which of the data contained in Exhibits 21 or 22 relate to Davie County?

A No.

Q Assume with me that evidence will show that observation 199 will be among those observations which relate to Davie County.

[*46] A All right.

Q What is the percentage of support for the Democratic candidate for the U. S. Senate in 1990 in that precinct?

A Are we talking about an internal precinct or an external precinct?

Q The external precinct.

(Witness peruses document.)

A The question again was?

Q What was the level of support for the Democratic candidate for the United States Senate in the precinct reflected as the outside precinct in segment 199--I'm sorry; segment 200, observation 199.

A It looks as though 30 percent of the voters in that precinct voted for the Democratic candidate.

Q Looking at the next observation---

A (interposing) Yes.

Q ---can you confirm that that involves a different external precinct from the same county, and can you tell us what the results were for the Democratic senate race in that precinct?

A That does have a different precinct identifier. And the fraction is once again 30 percent.

Q And continuing to the next page, I believe the next identifying--the next new identifier for an external precinct will be in the fourth line, observation 204?

[*47] A Yes.

Q Can you tell us what the Democratic percentage was for the Democratic candidate--I'm sorry, what the percentage was of support for the Democratic candidate in that precinct according to observation 209 for another precinct in that county?

A Observation 204?

Q Yes. I'm sorry; yes, 204.

A 30 percent.

Q And continuing to the next page, what is the next unique precinct on the outside? Is that at observation 208?

A Yes.

Q Can you tell me what the Democrat support was for the United States Senate in that precinct in the same county?

A Also 30 percent.

Q And the next observation, 209, does that also reflect a unique precinct within the same county?

A Yes.

Q And what is the Democrat support?

A Also 30 percent.

Q As a statistician would it surprise you that every precinct in the county voted in the same proportion in the United States senate contest?

A It would surprise me if they had all voted in exactly the same proportion, yes.

[*48] Q And if those data are incorrect could they affect the accuracy of your analysis?

A Yes, they could.

Q In fact, were precincts bordering Davie County among those which you used in calculating whether or not race or party were a better explainer--a better method of explaining the external boundaries of the district?

Q Yes.

Q There are more segments than precincts that comprise your analysis; is that correct?

A Yes.

Q Is that a form of double counting?

A No.

Q Are all convergent segments equally probative of each of the two theories, whether race or party predominated in the construction of the external boundary of the district?

A I treated them as equally probative.

Q Would it be possible that because of differences--that convergent segments could be used to support one or the other theory of the construction of the external boundary of the district because of differences in the level of change with respect to party or with respect to race?

A One could devise other measures that take into account the magnitudes of the differences across boundaries, yes.

Q And did you make any effort to conduct such an [*49] analysis?

A No.

Q Do you have any sense for what that analysis would show without conducting it?

A No.

Q Did you consider conducting such an analysis?

A Briefly, yes.

Q Did you make some initial attempts to evaluate data with respect to such an analysis?

A No.

Q I had an unrelated question on Exhibit 21, page 5, in the upper right-hand corner. These are 24 observations from data set NC.PRECINCT. Can you tell me what that analysis began to show, what the purpose of this activity was?

A What this program does is to combine information from two files. The first few records of one of the files is--are listed on page 5. And a short time ago we looked at the records that are listed on page 2. Those are the top few records from the other file on which this analysis is based.

And what the analysis--or what the computer program does is to combine these two files together to produce the single file that runs for many, many pages and contains the results of our calculations.

Q I wanted to draw your attention to the fourth row across of data, the fourth grouping of rows, where county [*50] names are listed, Beaufort and Bertie.

A Yes.

Q Are those the very first that exist in the file and is that the reason they are included at this location, or is there some

other purpose or reason why those two counties were included in these data?

A This is just the top of the file called NC.PRECINCT.

Q Do you have any information concerning in which congressional district those two counties are located?

A Not at the moment, no.

Q Does your analysis treat away all precinct comparisons as equivalent regardless of their respective populations? For purposes of proving or disproving theory, does each precinct segment count the same regardless of what the population is inside or outside the district?

A When you say what the population is, you are referring to the number of people as opposed to their---

Q (interposing) The total---

A ---either political composition or their racial composition?

Q That is right, their total number.

A The total number? Yes, the count is independent--or the correlation measure that I use is independent of the total number of people involved in each precinct.

Q In evaluating intent would there not be a need to [*51] weigh the segment analysis according to populations in order to determine intent in constructing a congressional district?

A I wouldn't think that there would be a need to do it. One could do it, but it is not necessary.

Q So this was not an approach you have attempted?

A That is correct. I did not attempt it.

Q And so each segment counts the same even if the two precincts involved are relatively small in population and have

relatively little effect on the overall character of the congressional district?

A That is correct.

Q And does this analysis count each precinct equally either in support or in opposition to the theory even if the differences are very small or even trivial?

A Well, I don't know about trivial, but all it does is to count up differences.

* * *

[*59] Q I want to turn your attention back to Exhibit 22 to observation number 160.

(Witness peruses document.)

A Page 39.

Q In looking at Exhibit 23, this is one of the observations that is used to support the Type P divergent segment analysis; is that correct?

(Witness peruses documents.)

A Yes.

Q And assuming that the evidence will show those identifiers to be High Point Precinct 1 on the inside included in Congressional District 12 and High Point Precinct 4 externally, which is excluded and not--or not included in Congressional District 12, can you tell me how many black registered voters there are in the 1st Precinct inside the district and what total number?

A Internally there are four registered blacks out of a total of 1,212.

Q And what about the external precinct not included?

(Witness peruses document.)

[*60] A And outside it is seven blacks registered out of 2,114.

Q And this is evidence that there is a higher proportion of black persons outside the district than inside the district for that segment?

A Yes, if you calculate the two percentages and compare them, one number is greater than the other.

Q And is that a significant difference in your view?

A Again, when I use the term "significant" it is within the context of a probability model. And I don't see what probability model would be applicable under these circumstances, so I don't use the term "significant" here.

Q So is this evidence that the designers of the district in determining which precincts to include or exclude along the external boundary as it wanders through High Point chose High Point Precinct 1 on the inside and excluded High Point Precinct 4 on the outside despite the fact that High Point 4 was a blacker precinct?

A What it is is an element in the correlation of the boundary line with the racial makeup of the precincts which it separates.

Q I want to look at observation number 6, which I believe will appear on page 9 of Exhibit 21.

(Witness peruses documents.)

Q Have you located that?

[*61] A Yes.

Q And can you tell me again for that precinct how many black persons are in the precinct outside the district and how many black persons are in the precinct inside the district?

A In the total population?

Q Among the registered voters, black registered voters.

(Witness peruses document.)

A Outside there are 305 black registered voters and inside there are 338 black registered voters.

Q What is the total number of registered voters inside the precinct?

A The total number of registered voters inside the precinct is 2,278.

Q And for the external precinct?

A The total number of registered voters is 2,005.

Q Now, again, is this evidence significant or important to support a hypothesis that the designers of the district were looking at party rather than race and determining to select the internal precinct and to exclude the external one in this instance?

A It is an element of evidence of that, yes.

Q Is it trivial evidence?

A That is your word, not mine.

Q Is it significant evidence?

[*62] A Again, I don't know what significance means in this context.

Q Would it surprise you that there are a number of other observations with very small differences in the number of black persons or in number and support for or registration as a Democrat for a number of these precincts that your analysis is based upon?

A I am sure there are small differences that go both ways.

Q And have you made any evaluation of those, the numbers and types of--let me back up. Have you made any

evaluation of thresholds beyond which there are larger differences or smaller differences and relate them to these 25 precincts said to be supportive of the party analysis and these 16 precincts said to be supportive of a race analysis?

A No.

Q Now, does your analysis take into account whether inclusion of the external precinct touching the boundary of the 12th Congressional District would require the creators to split open another county which at the moment in the process of developing this plan is wholly contained elsewhere?

A I don't understand the question.

Q Does it matter to you whether parts of the segment of this district lie along county boundaries for counties which are not included otherwise in the congressional district?

[*63] A No.

Q So you give the same weight and force to the failure of the legislature to break across a county line to take out a single precinct of a county and include it than if they are making adjustments within counties that are already in part included in the district?

A Right. It is important to note that what I am doing is measuring a correlation, not doing a decision analysis.

Q Do you have any information concerning how many of these, the 26 Type P comparisons or the 16 Type R comparisons, involve counties other than the six that are in the 1997 plan included in part in Congressional District 12?

A I'm sorry; I didn't understand the question.

Q Do you know how many of these data set--these data examples, the 25 Type P divergent and the 16 Type R

divergent, involve counties external to the six counties which comprise in part Congressional District 12?

A I think the answer is no, but I still don't understand the question.

Q Well, let me step back. Do you know the six counties that are included in the 12th Congressional District in 1997?

A Not offhand, no.

Q Okay. And do you know how many of the external precincts that are compared to precincts within the 12th Congressional District would be in counties that are not at [*64] present included in the 12th Congressional District at all?

A I don't know.

Q And again, in your view every segment counts equally in the analysis regardless of whether that is maybe a factor in the decision maker's mind?

A Right; this is a correlative study.

Q Do you know, for example, whether Davie County is a county that is included in the 12th Congressional District in any part at the present time?

A I don't recall at the moment.

* * *

[*71] Q Does it matter to your analysis whether those precincts which tend to support the party explanation for external precinct selection or the racial theory for their selection--whether they are in the urban counties at the extreme of the district or whether they are in the counties that make up the bridge or connection between those counties?

Ms. Smiley: Object to the form of the question; answer it, David. Go ahead.

A Could you give me the early part of the question again, please?

Q Does it matter to your analysis whether the precincts which are a Type P divergent or Type R divergent are located in the large urban counties of Mecklenburg, Forsyth, and Guilford or whether they are located in the connecting counties of Iredell, Rowan, and Davidson?

A It does not affect my calculation.

Q Have you ever performed any analysis to determine how many of those precincts upon which your analysis relies fall in one type of county as opposed to another?

A No.

Mr. Markham: Let me mark as Exhibit 25 a summary of the divergent precincts.

[*72] (Exhibit 25 was marked for identification.)

Q Assume with me that population data elsewhere in this case will establish the percentage of black population in the 12th Congressional District in the 1997 version from each of the counties. Does it matter to your analysis whether the Type P segments or for that matter the Type R segments occur in a county that provides a plurality of the black population for the district or whether it occurs in counties that provide less than 5 percent?

A The initial part of the question again was does it matter to the analysis?

Q Yes.

A No, it doesn't.

Q Do you know how many precincts in total are responsible for the 25 segments which are Type P and the 16 segments which are Type R?

A No.

Q Do you know what portion of the entire number of precincts or of the population of the district those precincts comprise?

A No.

Q And again, that has no effect on your analysis?

A That is correct.

Q Is it your view that because the partisan level of the [*73] district is in the 60 percentiles and the race level of the district is in the 40 percentiles for African American under several different measures that the designers must have been concerned more about party than by race? Was that the conclusion that you reached in your affidavit?

A Well, we can read the affidavit.

Ms. Smiley: Which affidavit are you referring to?

(Counsel peruses documents.)

Mr. Markham: I am interested in the---

Ms. Smiley: (interposing) Are you referring to Exhibit 19?

By Mr. Markham:

Q Yeah. I am referring to page 8 of Exhibit 19 and the analysis before that time. Is it the fact that partisan levels of support are higher than black population levels that in your view somehow lend support to a view that the designers were more concerned about party than about race, or am I misreading your analysis there?

A Well, the conclusion that I state is that these figures support the position that creation of a Democratic majority in District 12 is a more important consideration in its construction than was the creation of a black majority. The assertion there I think is based on the fairly obvious point that blacks in fact are not a majority in the 12th District, but Democrats are.

* * *

[*80] Q And is the same true for the four measures of party support? Did you make any effort to evaluate which of those is more likely to be a predictor of partisan behavior than another?

A I did do something there, although in the final analysis I treated all four equally. But I think that of the four voter registration is probably the least reliable indicator of voting behavior.

Q And yet if I understand correctly, the data which you provided which shows the greatest difference or support for the party thesis over the race thesis is in fact the voter [*81] registration data?

A I don't remember if that is the case or not. It may be.

Q Well, I will draw your attention to paragraph 18 of your Exhibit 19. And can you confirm that in fact it was the voter registration data upon which you base this portion of your analysis?

A Well, paragraph 18 does describe an analysis that is based on voter registration; that is correct. Paragraph 19 reports the results of all of the other analyses.

Q And are those results of the other analyses also reported in Exhibit 21 in summary fashion? And if so, can you tell us which pages?

A Yes.

(Witness peruses documents.)

The results are reported starting on page 35 through page 40.

Mr. Markham: Next we will mark Exhibit 27.

(Exhibit 27 was marked for identification.)

Q Can you confirm that this is an accurate summary of the race and party divergent segments on the various measures that you employed?

(Witness peruses documents.)

A Yes, it is.

[*82] Q Just so I am clear, as an example, if one were constructing the district based on the results in the lieutenant governor's race, the analysis would show that race was a better predictor than party for the external segments of the district 22 occasions to 19; is that correct?

A Yes.

Q And comparing to the voting age population data, if one were constructing a district using the political results of the lieutenant governor's race in 1988, race would be a better predictor than party for the external segments of this district 22 occasions compared to 17 occasions?

A Yes.

Q And similarly if you are looking at voter registration, 20 to 18?

(Witness peruses documents.)

A Yes, I believe that is correct.

Q And in fact the analysis that you reported in your affidavit is a comparison of Democrat voter registration to racial registration, which is the last column in the bottom row; is that correct?

A The one that is described in paragraph 18?

Q Yes.

A Yes, I believe that is the case.

Q And that is the instance out of these 12 comparisons in which party most exceeded race; is that correct?

[*83] (Witness peruses documents.)

A Yes.

Q And if registration is less reliable, is it less reliable both with respect to Democratic registration and with respect to African American registration?

A I doubt it. I don't know what the reason for that would be.

Q But if we discounted those analyses which include registration as a component, then the analyses which would be relevant to this inquiry would be the six analyses on the top two rows for the first three columns for lieutenant governor, Court of Appeals, and U. S. Senate; is that correct?

A If for some reason we were to discount registration entirely, you are right, although I can't think why we would do that.

* * *

[*84] Q If that single precinct were needed to provide contiguity to the district---

[*85] A (interposing) Right.

Q ---that element of the analysis wouldn't factor into your mathematical analysis, but in fact that segment along that precinct is proof that party drove the external boundary location at that location of the district?

Mr. Stein: Objection.

Ms. Smiley: Objection to form.

A The boundary of the segment would be included in my calculation and it would be an element in the calculation of the correlation or the degree of association between the 12th District boundary and the characteristics of the party affiliations on the one hand or the racial identities on the other of people living on either side of the boundary. So it would figure into the calculation.

Q But your analysis would not take into account the possible individual idiosyncratic explanations for any one precinct's presence or exclusion in a district based on geography, for example?

A That is true. It simply accepts the boundary as it was drawn and asks does this boundary function better to separate--does this boundary function better to fence in Democrats or does it function better to fence in blacks.

Q And for example, in your Exhibit 20, the map of Iredell County where---

(Counsel peruses document.)

[*86] Let me scratch that. For example, if inclusion of a precinct would result in some distortion of the geographic shape, that would not factor into your analysis in any way?

Mr. Stein: Objection; asked and answered.

A The analysis depends upon the boundaries that are involved in the 12th District and the nature of the people on

either side of the boundary, immediately on either side of the boundary. And it measures the degree of correlation between the path taken by the boundary and the racial composition of people living on either side of the boundary and the political affiliation of the people living on either side of the boundary.

Q And if in fact you included a precinct which had previously been excluded, your analysis doesn't review where it would be necessary to remove a precinct of equivalent population in order to achieve population equality, for example?

A No.

Q And you don't swap or compare groups of precincts of equivalent populations, do you?

A I certainly don't.

Q And the segment analysis--in an instance where the district is one precinct wide, the segment analysis assumes that you could add the external precinct and exclude the internal precinct, or does it?

[*87] A No, it makes no such assumption.

Q And it makes no comparison of what the effect on the district would be to have both the internal and the adjacent external precinct compared to just the internal precinct?

A That is correct. It doesn't do that either.

Q So in the construction of a district are decision makers able to decide to include or exclude a district based on a difference in race or party as the model analyzes?

Mr. Stein: Objection.

A I don't understand the question.

Q Does the analysis that you have conducted take into account whether a decision maker in fact could include the

external precinct and exclude the internal one consistent with, for example, contiguity or equal population or any other interest?

Mr. Stein: Objection; asked and answered.

A What the analysis does is to measure the correlation between an existing line. It doesn't consider other lines. It considers just the existing line. It says what is the correlation between this and race, what is the correlation between this and political affiliation.

Q And when you said your analysis is not a decision making analysis, you meant by that that your analysis doesn't determine whether at that stage of drawing the boundary any decision maker would or could make that kind of comparison?

[*88] A What the analysis doesn't do is to ask what other correlations might be achieved by drawing the lines elsewhere.

Q Do you have any personal knowledge of the neighborhoods of the 12th Congressional District or the counties that comprise it? Have you done any--as a part of your analysis have you made any investigation?

A Only to the extent that I have driven through them on occasion, but not for any purpose connected with this litigation.

* * *

[*98] Q In the analysis that you have performed respecting the selection of grand jury foremen, members of the grand jury, has one of the issues in the analysis been whether race was a motive in that selection process?

A That has been the issue, yes.

Q And is the same true in your employment discrimination activities in preparation for testimony in those cases?

A In some of them, yes.

[*99] Q And have you both testified that race was a motive in employment decisions and was not a motive? Have you both---

A (interposing) Usually---

Q You have reached that analysis?

A Usually statistical analysis can't reach the ultimate issue. The only thing statistical analysis can do is to say here is evidence in favor of this or here is evidence in favor of that. But it doesn't ever get to the bottom line that says race was a factor or race was not a factor any more than I can do party affiliation was the factor or not the factor.

But to get back to what I think is the spirit of your question, have I worked both for plaintiffs and for defendants--not on the same case, of course--the answer is yes, sometimes I have supported plaintiff's position, and yes, sometimes I have supported defendant's position. I have also had clients that I have had to tell that I was sorry that I couldn't support their position, both plaintiff and defendant.

[*33] Q Well, as a social--I realize that you are not a lawyer, but you are a political scientist dealing in the redistricting area. Would it be your view that a state law which forbids the cutting of a county line would outweigh or [*34] override the Voting Rights Act, Section 2 of the Voting Rights Act?

Mr. Markham: Objection. He is not an attorney.

Q As a political scientist, you have discussed this issue and you said you had given advice. I am not asking---

A (interposing) Yeah.

Q ---for your legal opinion.

A Yeah. It now turns out because of--because of *Miller v. Johnson* to be one of the race neutral criteria, you know, to minimize the splitting of counties. And even at that time I had the sense that that was where the courts were ultimately going to go as they were going to pay some attention to county lines. And Michigan had a tradition of--in the state legislature, now, of paying a tremendous amount of attention to county lines.

Q So as a political scientist, you do believe that county lines override Section 2 of the Voting Rights Act?

Mr. Markham: Objection to form; calls for legal conclusion.

Q As a political scientist.

A I think these are factors that the court would have to take into account, and the question about whether or not there is a violation of Section 2 would depend more upon the numerosity and concentration of the minority group, you know,

the cohesiveness of the minority group, and of course the [*35] third element, the cohesion of the white voters.

Q And if that exists, as a political scientist do you believe that a county line can be preserved and you could ignore a concentration of cohesive African Americans?

A You could then cross the county line in order to create a district; yes.

Q And in fact have you--in any of the cases where you have been involved in Section 2, have you ever had to give advice to a governmental entity that it needed to cut county lines or other political subdivisions in order to create a Section 2 district, or has that just never been part of what you have to do in a Section 2 case?

A I have had to evaluate proposals that did that.

Q Section 2?

A Yeah; proposals by the plaintiffs typically to do that, and so that--I have had to take that into consideration.

Q And on occasion have you had to give your governmental client an opinion that in fact they might have to split some jurisdictional boundary or governmental boundary?

Mr. Markham: Again, objection as it calls for a legal conclusion.

Ms. Smiley: No, I am asking him a fact question.

By Ms. Smiley:

Q Have you on occasion so advised a governmental entity?

[*36] A Yeah. I think back in--way back in the early *Clark v. Edwards* case where we had multiparish judicial districts and where, you know, the evidence suggested that there was a sufficiently large and geographically concentrated

African American population and there was other elements to the proof, ultimately the districts that I drew crossed some parish boundaries.

* * *

[*36] Q And who did you--who were you retained by in those [*37] cases?

A Plaintiffs in *Hays*, plaintiffs in *Johnson*, and plaintiffs in *Shaw*.

Q And were the plaintiffs white plaintiffs in those three cases?

A In *Hays* they were mixed, two white, one African American and one Asian American. *Johnson*, I don't remember all of the plaintiffs. I do remember Davida Johnson, the first named plaintiff, is white. And as I recall, I believe the plaintiffs in *Shaw* were white--are white.

* * *

[*63] Q *Moon v. Meadows*?

A *Shaw* case.

Q And what kind of analysis did you offer--excuse me. Did you represent the plaintiffs suing the government?

A Yes, Donald Moon and his coplaintiff.

Q And were they minorities?

A One was white and one was African American.

* * *

[*69] Q And I believe in that declaration you addressed that question looking at county splits and town splits; is that correct?

A County and municipality splits; yes. I did not have time to do the precinct splits at that point. There were only two precincts in that geography. There are more precincts in today's world that are split than those two.

* * *

[*70] Q Did you consider any other hypothesis aside from race as a predominant factor?

A No. I have always found race to be the most powerful explanation for bizarre districts.

Q Then you don't look at any other alternative?

A I consider other alternatives to the extent that the defendants offer alternative explanations.

Q In your '98 declaration, did you consider--when you did your work at that time, did you consider any other alternative explanations?

A I read the Peterson affidavit. I didn't know what to make of it. I was really under incredible time pressure. I finally said to Mr. McGee--I said, "I can't really relate very well in my declaration at that time to this Peterson analysis," because it was a nonstandard analysis. It wasn't an analysis that political scientists typically do.

[*71] Q It was one you were not familiar with?

A I was not familiar with it at that time; yes.

Q Well, you knew there was an alternative hypothesis?

A From Peterson's report I knew there was an alternative hypothesis.

Q And was that the first time that it was ever presented to you that there might be an alternative hypothesis as opposed to race?

A No. I have heard this in other cases, the alternative hypothesis being it is politics; yeah.

Q And how did you eliminate politics--when you were doing your 1998 report, how did you eliminate the political hypothesis?

A I did not eliminate it at that time.

Q You did not?

A Did not.

Q Are you saying that in your--in your Exhibit 47, are you saying that you have eliminated that hypothesis?

A I believe I have done enough analysis of the Peterson analysis to come to the conclusion that race was more important then party.

Q And have you--is that the only way you have attempted to eliminate that hypothesis is refuting the Peterson affidavit?

A Well, no. You take the data from the--all of the [*72] precincts in the district and as we--I have done here in Table 6 array both the racial data and the four--excuse me, the three partisan measures, and then consider whether one is better than the other.

* * *

[*119] Q And what do you mean by electorally competitive?

A Meaning to say that either party would, absent incumbency, have a reasonable opportunity of winning the district.

Q And what do you consider a reasonable opportunity?

A Meaning that when the candidates file and they raise their funds and they go to the voters that they are going to be sitting on pins and needles until the election returns are over.

Q Have you put a number?

A Oh, yes, of course.

Q And---

A (interposing) The criterion that I use in all of my work in political science is that a district that is 60 percent or more in favor of one party--60 percent Republican or 60 percent Democratic--is uncompetitive. A district that is less then 60 percent, 59.9 and lower, in the return is competitive.

Q When you said fair you talked about leaving aside incumbency?

A Well, yes. Incumbency can affect the relative competitiveness of a district.

[*120] Q So if you have a district that is over 60 percent and the elections reflect incumbent voting totals, then would you still--would you say a district is unfair based on election results that are---

A (interposing) No.

Q ---based on incumbency or do you have to use a different number?

A No, we don't have to use a different number. What we just know is that it is--it is highly unlikely that the

challenger, whoever the challenger might be, will in fact make an effective challenge--that is, be able to in fact unseat the incumbent.

There are a few occasions in the United States where districts in the previous election were greater than 60-40 in difference where in the next election an incumbent was unseated, but they are usually in the context of scandals or something like that.

Q Well, do you put a number--I mean, if you put a--you say anything over 60 percent you say is noncompetitive. Do you put a number in terms of what percent you give to an incumbent?

A No, because it is going to vary from district to district.

Q Well, do you have even a--well, do you analyze? Do you compare elections to determine whether or not you can put [*121] a number?

A You can go through and look at the elections and make some assessment of the effectiveness of a challenge. Typically incumbents do not fact effective challenges. There are only a few districts in the country that are ever effectively challenged.

Q Well, I just--I am just trying to figure out--since some of the election data I think that you are relying on here does have incumbents, I am trying to figure out how you determine that a district is not competitive when you know the issue has to do with incumbency.

A Well, that is where you have the data for all--as many elections as you possibly can so you can in fact have some that involve incumbency and don't involve incumbency. I

mean, unfortunately in--I believe of the statewide elections that I am looking at I think only perhaps the '72 election with Mr. Campbell may not have been an incumbent election. I am not sure, but I don't believe he was an incumbent that year. But I think all of the others involving Mr. Helms or the one most recently with Mr. Faircloth, they were incumbents.

Mr. Markham: So the record will be clear, I think you misspoke and said 1972 election.

The Witness: Okay; 1992. I am sorry.

By Ms. Smiley:

[*122] Q So you recognize that incumbency is a difference, but you have not in any way tried to weight or put a number on the incumbency advantage---

A (interposing) No.

* * *

[*122] Q Well, do you have a particular measure or criteria for deciding whether a district is race predominant?

A It has to do again with the assignment of the precincts. Remember, we talked about overwhelming--almost always assigning the black precincts to the black district.

Q Well--all right; so it wouldn't matter, say, in District 12 the fact that it is not majority minority. You would still consider that a race predominant district?

A Yes, because again, statewide it is--you know, the statewide numbers are all in the neighborhood of 20 to 22 percent African American.

* * *

[*131] Q And do you know where the majority of that population growth occurred?

A I think I have seen something on that in Dr. Stuart's report, but I don't recall specifically.

Q Well, do you know anything about North Carolina and its---

A (interposing) Well, I---

Mr. Markham: (interposing) Objection to form.

Q ---population?

A I am not going to speculate, but I do remember the following. That is that generally the counties in the northeastern part of the state have been declining relative to the growth and the growth has primarily been in the piedmont.

Q And the piedmont would be--do you know what towns or counties---

A (interposing) Yeah. Well, you are talking about the so-called Triad, the urban Triad, running from Charlotte to **[*132]** basically Durham with stops in Greensboro and Winston-Salem.

Q So that is where the population growth has occurred?

A Yes, ma'am.

Q If you are going to insert a district, there is one place that you have got population?

A Well, you can insert it almost anywhere when you do it.

Q And in fact that is a prerogative of the General Assembly---

Mr. Markham: Objection to form; calls for legal conclusion.

Q ---in terms of---

A (interposing) It is in fact a prerogative, but the only problem we now have is that one has to do this using race neutral criteria.

* * *

[*135] Q But you have already agreed that that plan, the 1980s plan, would not be constitutional under the 1990s population figures?

A That is correct. Yes.

Q And this is not to be a legal benchmark of any kind?

A I can't assert legal benchmarks.

Q Well---

A (interposing) As an expert I can't do that.

Q Well, I agree. You are not a lawyer, but you cite cases throughout this opinion--I mean, throughout this report, and I just wondered, are you using that term "legal benchmark" in a legal sense at all?

A I think it could be construed that way.

Q Is the 1980s plan an appropriate social science benchmark for determining a racially fair 12 district plan?

A The 1980s plan was determined to be racially fair by the Department of Justice.

* * *

[*138] Q Now, if you were going to address the role of partisan politics or party preference, what data would you need?

A I believe there are sufficient data in the submission materials--that is, the three elections 1988 and 1990, albeit that I consider them somewhat stale, and you have the registration breakdown by both party and race.

Q And that is what you would need to address the issue [*139] of party, or the role of party?

A That would be sufficient.

Q Okay.

A That would be sufficient.

Q Now, what criteria would you use to determine the relative importance of the role of race and the role of party?

A It would be the exact same criteria. If I were to be assessing the predominance of race, I would be looking at the racial characteristics of the precincts. If I were looking at the predominance of party, I would look at the party data by precinct.

Q And would you give--and you had what, four measures of party data?

(Witness peruses document.)

A Yes.

* * *

[*141] Q Well, I thought somewhere in your report you talked about how Democrats could have been put in District 8?

A Yes, if you were going to cut a line between District 9 and 8 over to 12 in Mecklenburg because you have a border there that is coterminous. But they chose not to do that.

[*142] Q And what is your inference on their choosing not to do that?

A My inference is that they did not want to split Mecklenburg more than twice.

Q Do you have any basis for that?

A I remember, I think, Senator Cooper was proud that they hadn't done that anywhere in the state.

* * *

[*143] Q Now, you say in paragraph 15 at the bottom of page 12 that Districts 1 and 12 were created to elect an African American member of Congress?

A Right.

Q And what is the basis for that opinion?

A Well, with some subsequent data that I received I determined that both District 1 and District 12 have a majority of black registered voters in the Democratic primary, so that means that black voters have the ability to control the Democratic nomination and having the ability then to control the Democratic nomination can nominate the Democratic candidate. Then the Democratic candidate can count on some crossover voting in the general election to win.

* * *

[*144] Q Well, would you also conclude from this data that Districts 1 and 12 would allow the election of a Democrat?

A Yes. Whoever was nominated by the Democratic electorate would be--would be elected by the electorate in the general election; yes.

[*145] Q So that might be white or black?

A Yes, but the crucial point to me was that if you have a majority of the registered voters participating in the Democratic primary who happen to be African American that at least gives a very strong opportunity for that group to control the outcome of the nomination.

Q And is there something wrong with that?

A No, there is nothing wrong with that.

Q Okay.

A It is just a fact; yeah.

Q Okay. That is right; it is just a fact. It is just a fact.

A No. There is nothing--nothing normatively wrong with that at all.

* * *

[*156] Q So it doesn't matter to you whether a precinct is 5 miles wide or 10 miles wide. If it is one precinct, then that is a narrow bridge?

A That is relatively narrow; yes.

Q And it doesn't matter the number of miles?

A I guess the more miles, the less narrow it would be.

Q But the problem is, though---

A (interposing) The fewer--yeah, yeah.

Q ---for your criteria it doesn't matter how many miles or how big that precinct is geographically. If it is precinct, you would describe it as a political scientist as a narrow corridor?
[*157] A Yes.

* * *

[*167] Q Well, as a drafter of a plan, if you were concerned with the partisan aspects and creating Democratic or Republican districts, how would you start?
A You would start with the precincts that gave the largest degree of support to Democratic candidates.
Q Precincts or counties?
A Counties and then precincts.
Q And then precincts?
A Yeah.
Q And then you would work along the margins?
A Yeah.

* * *

[*169] Q You say at the bottom of that page 18, "When counties were split to achieve population equality, the racial composition of the components differ little." Which counties demonstrate that?
A Chatham, for example; not much difference.
Q Is that chart 2?
A Yeah, Table 2.
Q Well, 6,000 versus 2,000?

A Right; but then look at the percentages, 20.9 versus 28.7.

* * *

[*172] Q And you particularly pick out Mecklenburg County and Guilford County in terms of looking at the differences?
A And Forsyth as well.
Q Is Forsyth in there?
A Yeah; at the top.
Q At the top; that is why I can't see it. Okay. For those counties, were you using once again your 20 percent?
A These are vastly greater than 20 percent. I mean, Forsyth is like 61 percent difference. Guilford is 41 percent. Mecklenburg is about 43 percent difference. These [*173] are vast differences.
Q So what is--40 percent--what percentage criteria is vast as opposed to enough?
A There are twice--there are twice as many as the--it is significant, a substantively significant number. It turns out they put 88 percent of the black populations in those three counties in District 12.

* * *

[*188] Q ---you apparently are not particularly impressed that the state did not split precincts particularly in the 1997 [*189] plan?

A In comparison to what they used to do, yes, that is an improvement. But the point I think is very important is that they did not use the 1997 precincts. They used the 1990 precincts. So there are places in the state where there were old precinct lines that now split new precinct lines and so you have got some difficulties in election administration with the districts as they were fashioned.

Q But is that something the legislators would have necessarily been aware of?

A If you had asked me my advice, given the *Shaw* litigation and all of that, I would have been prepared and have altered--and I know the system is alterable because Louisiana did it--put in and adjusted the population data to fit the political data after 1996 as you were going to start doing this work in 1997.

Q Well, isn't the fact that there are only two districts (sic) split in the entire plan a positive, I mean, based on 1999 data, obviously.

Mr. Markham: Objection to form.

A It is an improvement over 1992, but again, I just don't think that that is terribly important. It is a question of is it an improvement over 1980s in terms of, again, what was the electoral geography in the '80s and what could one do in that particular plan.

[*190] Louisiana did everything in *Hays* using precinct lines and the court ultimately found that they were not protected by using precinct lines. Precinct lines are now defined racially in the south, and so precinct lines are not a protection.

* * *

[*192] program in 1990. My larger point was it would have been better to have used the current precinct structure so you don't have election administration problems where a piece of the precinct is in one district and another piece of the precinct is in another district.

Q And do you know how many places that occurs in North Carolina?

A No. I have been asking hoping to find that out.

Q And apparently it must be a manageable problem?

A I don't know.

Q You don't know?

A I don't know.

Q So that is speculation? You have no data to support that?

A No. That is correct.

* * *

[*247] Q Well, if the General Assembly did not consider the Gantt-Helms the best political bellwether, would that be a **[*248]** reason why fewer of the districts that show over 50 percent Gantt support in this particular election are not included in the district?

A I guess. All I can say is that as a political scientist that doesn't make any sense. I would use the best and most recent race. And furthermore, if I am trying to construct a district that would be a realistic opportunity district for an African American candidate, I would use the Gantt versus Helms race.

Q But what if the legislature was trying to build a Democratic district?

A That is the theory. That is the theory. They are trying to build a Democratic district.

Q And if they were trying--okay; that is the theory. And if they were trying to build a Democratic district---

A (interposing) Then---

Q ---wouldn't they look at the races that were more bellwethers for Democratic-Republican strength and that did not also have incumbency factors--or, I'm sorry, not incumbency but home court advantage?

A Yeah. I understand what you are saying. It just seems to me for District 6--or excuse me, District 12, I would have used the Gantt-Helms race of 1990.

Q Do you have any information--you said you have read depositions and you got this other information about **[*249]** legislative intent and you have read all these other things. Do you have any information to support your--to support a theory that the legislature in fact relied most importantly on this Gantt race?

A No. I believe Senator Cooper said they didn't.

Q So the fact that you might and this chart gives you your best results--I mean, if the legislature---

A (interposing) But you see, I am not---

Q ---didn't use it---

A (interposing) I am not asserting a defense that this was partisanship.

Q Exactly; you are asserting it is racial?

A Yes. The State is asserting that it is partisan, so---

Q (interposing) And your are---

A ---it seems to me that the best partisan--the best way to get at the partisan data would have been to use the Gantt-Helms race in 1990.

Q But that is only because you consider that a good partisan measure?

A Yes.

Q And the politicians in North Carolina--the Democratic politicians in North Carolina you understand do not believe that that is the best race to use?

A They are entitled--we are entitled to our differences **[*250]** in opinion, yes.

* * *

[*250] Q And based on what you have read, and apparently you have looked at other materials besides data and maps, what your understanding of the importance of registration data to the North Carolina legislators?

[*251] A Not very important.

Q Not very important?

A No.

Q Okay.

A Senator Cooper says that and I would have been surprised if he had said anything but that.

Q Are you inferring that he is lying?

A No, no, no, no. You misunderstood me. I would---

Q (interposing) I would hope so.

A Yeah; I would be surprised--you know, all I am saying is that partisan registration data are notoriously imprecise in

terms of determining whether one is going to vote Democratic or vote Republican.

* * *

[*348] Q You had mentioned earlier in your testimony, I thought, that you found that maintaining the core was a traditional--maintaining the core was something they were trying to achieve--in these districts was something they were trying to achieve in redistricting '97.

A Well, that is--according to Mr. Cohen, that was a goal, yes.

Q And my question for you is as a social scientist or in your assessment of the redistricting cases that have come out since *Shaw* that you have assessed and talked about, would that also be a traditional redistricting criteria?

A No, I don't consider it a traditional districting [*349] principle. It is a principle that legislatures invariably use, because they were having to deal with people that literally believe they own their seats that they have. And they would like to have minimal disruption to the electoral connection between them and the voters that they are representing. So consequently it comes up over and over again.

And so legislatures are in a way you can understand--you may not excuse but you can understand why legislatures are reluctant to make major changes to districts. And it is only in the context of unconstitutional districts that sometimes legislatures are forced to do this. And this goes back to the '60s when, you know, I began to look at one person one vote cases.

So the point is that yes, reality suggests that legislatures and legislators pay a lot of attention. And this is in a way why sometimes when these things all come to fruition in courts perhaps the best possible outcome is what happened in Louisiana and what happened in Georgia, was that the judges ordered interim plans rather than leaving it to the legislature to continue to sort of constantly modify plans based on the unconstitutional plans.

[This page intentionally left blank.]

[*44] Q All right. Well, regardless of what you said, I am still curious as to whether you think *Shaw* as originally decided was wrongly decided. And not to be difficult, but I do believe this partakes of a yes or no answer.

A I am an academic, and rarely is anything yes or no.

Q I am a lawyer, and everything is yes or no.

Ms. Smiley: The witness has answered the question and you are entitled to explain the answer.

Mr. Popper: I apologize for arguing; I apologize.

Ms. Smiley: You may have distracted the witness, Mr. Popper.

A I believe the patterns of interaction are a wonderful basis on which to delineate a district, and therefore a [*45] freeway system is a wonderful basis on which to delineate a district. Whether or not the 12th was a racial gerrymander I don't know. But I don't take exception as a political geographer to the delineation of the district focusing on transportation routes.

Q You have read that decision all the way through, haven't you?

A In 1993 I believe so, quite some time ago.

Q If you were a Supreme Court justice would you have sided with the majority or minority?

A I likely would have sided with the minority because I do believe that the state legislature of each state has an overriding right to delineate districts in the way that they see fit.

* * *

[*46] Q Would you have sided with the majority or minority in *Miller v. Johnson*?

A I do not specifically recall the levels of compactness of the 11th District, but I likely would have sided with the minority.

Q Would the same probably be true for *Shaw v. Hunt* and *Bush v. Vera*?

A I hate to use the word "probably", but I believe probably if I went back and looked at the evidence that I likely would have sided with the minority.

* * *

[*49] In your report did you compare the compactness of the North Carolina districts in the '97 plan to the compactness of the North Carolina districts in the plan that resulted after the 1980s round of redistricting?

A No, sir.

Q Why not?

A One, I am not sure it is as relevant as comparing them to the '92 districts, and —

Q (interposing) Relevant in a legal sense?

Ms. Smiley: Object to the form of the question.

[*50] Q Well, in what sense do you mean relevant?

A In this particular circumstance, one, there was an increase of one district. That changes the system. Two, in terms of the continuity of representation, I think it should be based on the last plan. Three, the 1990s plan had a population disparity of 1.76 and therefore would have been found unconstitutional in 1992 in any case.

Q The 1980s plan?

A Yes, sir. And therefore, is the 1980s plan the most relevant given that it was unconstitutional, given its population disparities.

* * *

[*79] Q You are not prepared to say that there is even one possible African American majority district?

A In the '97 plan, if I recall, but again, I don't have my report in front of me, I believe the 1st District was less than 51 percent African American but still slightly majority in terms of its African American total population. Both of [*80] its compactness indices were above benchmark minimal levels. I suspect I could based on those two elements conclude that in general, yes, there is in the area of the 1st.

Q There may be numerically sufficient numbers to constitute a majority, but my question is do you have an opinion about whether a reasonably geographically compact district could be drawn in North Carolina that encompasses such a majority?

Ms. Smiley: Object to the question; asked and answered. You can go ahead and repeat your answer.

A I did compactness indices, of course, for '92 and the '97 plans' district--districts. I don't have my report in front of me, so I can't look at those coefficients to confirm how far about the benchmarks for low compactness.

But given the fact that a district was delineated, given the fact that it is slightly majority African American, and given the fact that its compactness indices are above the minimum

levels, I think I could conclude that there is a sufficiently geographically compact African American population in that part of the state that could be the core of a district.

Q Do you believe that the measuring unit in constructing what I shall call a *Gingles* district is voting age population or total population or registered voting population?

A This is, of course, an issue that political scientists [*81] debate actively. Political geographers, on the other hand, we have not debated it to any great degree.

Though many would argue that voting age population is critical, and I understand that logic implicitly, it does seem to me that regardless of whether one is 6 months old or 80 years old, one is still entitled to representation even though one can't vote. Hence, I think in terms of my reading, the first place one ought to look is total population.

[*69] Q. Well, the first four of those plans did not have a majority African American population, the fifth one is slightly over 50 percent. Do you recall whether or not at that time there was any belief on the part of any of you who were working on preparing plans as to whether it would be necessary to have a majority black district in North Carolina in the redistricting plan?

A. I recall that at some point in time that I formed the opinion that we should have a majority black district in the northeast to avoid being in violation of Section 2 of the Voting Rights Act, but I do not recall when in time I formed that opinion.

Q. How about in terms of pre-clearance, did you form an opinion as to whether or not there was a requirement -- whether or not the Department of Justice would deny [*70] pre-clearance unless there was a majority black district formed?

A. I don't recall forming that opinion.

Q. So your concern then was primarily with respect to Section 2 of the Voting Rights Act?

A. Right.

Q. Can you explain the basis of that opinion -- and, well, first do you have any idea of the time frame in which you formed it?

A. It would have been in 1996 or 1997, and it -- and I think that one of the things that we were trying to do was to determine whether we could make a majority black district in that part of the state that we thought was compact, which would have been relevant to answering that question. So it's not like

you answer it in the abstract and then go try to draw the district, it's a little interactive. I was aware from my previous experience that there was a high level of racially polarized voting in that part of the state.

Q. You mean the northeastern part of the state?

A. Right. And I believe that -- that at some point in time, although I don't remember what year it was, that Adam Stein came to the Redistricting Committee with updated data about racially polarized voting in the northeast part of the state. It must have been in 1997, [*71] because I think the data came from the Gant/Helms 1996 race. The -- and I was of course aware that there was a relatively high concentration of black people living in the northeast part of the state. And I think one of the -- one of the questions we had was whether -- whether there could be a compact district or relatively compact district without going all the way down to Columbus County or Cumberland or New Hanover County that would be majority black, and one of the questions was whether it could really be a district that didn't include Durham because there was some sense that the urban nature of Durham made it pretty different from the rural Eastern North Carolina.

Q. Then did you finally come to the conclusion that it was possible to create a geographically compact majority black district that would not -- in the northeastern part of the state that would not include Durham?

A. Yes, eventually.

Q. Pardon me?

A. Eventually we did.

Q. Can you describe how -- now, did you actually -- did you actually print out or display a district of that type, I mean

so you knew where it was?

A. Well, it's my opinion that the 1997 Senate plan that Senator Cooper presented to the Senate Committee [*72] contains a geographically compact majority black district in the northeast part of the state in it.

* * *

[*78] Q. How does that compare as to the 1st District with the plan that you were mentioning a moment ago, the Cooper plan where you said that you thought they had a geographically compact majority black 1st District?

Ms. Smiley: Which is Exhibit 6?

Mr. Everett: Yes.

A. Well, the '97 plan splits Granville and Person Counties and Senator Cooper's plan didn't split Granville and Person Counties. I believe the adopted plan put more of Pitt County into the 3rd District, which is what Representative Jones, Walter Jones wanted, because he lives in Pitt County. Jones County is mostly in the 1st District in the adopted plan and none of Jones County is in the 1st District in the Cooper plan, which I assume was done to -- in part because of the movement of people out of Pitt County from the 1st District into the 3rd District, to balance out the population. I can't really tell about Lenoir County, whether it's the same or not. That seems to be the biggest difference is that Person, Granville became split, I don't remember why, and -- but [*79] my guess is it had something to do with trying to balance out the 2nd and 4th District, which is a big matter of controversy between the House and the Senate, and that more of Pitt went into the 3rd

to make Walter Jones happy and more of Jones went into the 1st I guess to balance out the population. Those seem to be the major changes.

Q. Which of the two would you view as the more compact, the Cooper plan or the plan, the 1997, that is as to the 1st District?

Ms. Smiley: Object to the form of the question. You can answer that if you can.

Q. I'm sorry, geographically compact.

Ms. Smiley: I still object to the form of the question. You can answer if you can.

A. Well, the Cooper plan seems to have more whole counties and the adopted plan seems to have more fractured counties.

* * *

[*92] A. . . . if I even kept it when I got it. The only thing that I kept at the time was -- I kept some copies of some maps that were kind of on the table at the time and then when we moved on to another map I tended to throw them away because it got too confusing. I didn't keep -- I made no attempt to keep an accurate like historical file of the stuff, because I assumed that the people would in bill drafting, that that was their job, it wasn't my job. So I just kept what was useful to me at the moment.

Q. Let's look at the second paragraph of that e-mail. Can [*93] you give us the benefit of your interpretation of what is meant by that paragraph? And there is a reference in here that Franklin was all in the 1st under Cooper .30 and it's a past

tense, which may or may not be significant, but what is -- what do you interpret that paragraph to mean?

A. The part about Franklin County?

Q. Well, the whole paragraph. The district -- when he refers to improved, what do you interpret that to mean?

Ms. Smiley: Object to the form of the question.

A. I don't know what he meant. Are you asking me what he meant?

Q. What do you think he meant?

A. That in some way he thought the district was better -- well, the first sentence I can't tell whether he's -- on what -- there's some way that he can't make it any better, but since I don't know what Senator Cooper's instructions to him -- I don't know what his goal was so I don't know the answer to that. It could have been political, it could have been racial, it could have been -- and I just -- geographic, you know, pretty, I don't know.

Q. In the context, since it's only a reference to racial, wouldn't it be your interpretation that the improvement [*94] related to changes in racial percentages?

A. No, I wouldn't. I wouldn't necessarily infer that, because as I have previously told you, in that part of the state there are also political concerns about these counties that were in the 1st Senate District, so I don't -- I don't -- and he could have had more than one thing on his plate at the same time.

Q. But when he says I was able to boost the district to 49.28 percent white, 49.62 percent black, what is your interpretation of that sentence?

Ms. Smiley: Object to the form of the question.

Q. What was being boosted?

A. I assume what was being boosted was the black percentage.

Q. And at the same time the white was being reduced?

A. Yes. It appears to be.

Q. And when he says I could probably improve this or thins, t-h-i-n-s, a bit more by switching precincts, would your interpretation be that the improvement was in terms of increasing the black percentage to a higher?

Ms. Smiley: Object to the form of the question. You can answer it if you can.

A. I don't know what he was thinking, but I would infer **[*95]** from that that he was talking about making the black percentage higher.

Q. Now, do you know whether or not in any way this was against a backdrop of any belief that it had to get up to 50 percent?

A. Whose belief?

Q. Pardon me?

A. Whose belief?

Q. His belief or that he -- that he had been instructed to get it to 50 percent or to try to get it to 50 percent?

A. I don't know whether it was in the backdrop of trying to determine whether it was possible to get it to 50 percent or whether it was in the backdrop that we already knew it was possible but there were some political constraints that we were trying to see if it was possible to do it in some other way. I don't -- it's possible that we already knew it could be done and we were trying to find a different way to do it or it's possible that we didn't yet know whether it could be done.

* * *

[*99] Q. Thank you very much. Returning to the e-mail, which is Exhibit 58. The last sentence there, last two sentences. I have moved Greensboro black community into the 12th. What was the Greensboro black community that he was referring to, if you -- if you know or have any belief?

A. I assume that it means that he had put part of Guilford County, probably -- and probably -- certainly not just the Greensboro black community but part of Guilford County that contained -- part of which was the predominant black precincts in Greensboro, and I assume some other precincts as well, had moved them from I guess the 6th Congressional District to the 12th, and it must have meant that he had moved about 60,000 people into the 12th and to keep the population balanced you would have to take 60,000 people out.

Q. His reference to the black community, does that mean that he would have to take about 60,000 whites out to make up for that or do you --

A. Oh, no, I doubt if that was possible. He probably took -- and I don't know what we took out, but -- and he could have, I don't know. I don't know whether the net impact of that was to increase the black population of **[*100]** the district or whether it wasn't. He may have taken out -- and you can't tell from this. I'm sure it wasn't 60,000 black people that he moved in. It may have been just like 30,000 or 25,000, and you can't tell from this whether that had a net impact of increasing the black population of the district or whether it kept just even or -- you can't tell.

Q. Do you have any recollection as to how many African

Americans in Guilford County were in the 12th District under the 1997 plan?

A. No.

Q. Nor how they were allocated between -- how many were in High Point on the one hand and Greensboro on the other or some third place, you don't know any allocation?

A. Well, I don't believe there would have been a third place, but -- and there is some territory between High Point and Greensboro and it may have some black people that live in it too, I don't know.

Q. I was thinking places like Jamestown and out in that area. I don't know.

A. Jamestown is pretty republican, so I doubt if we intentionally put it in the 12th District, but it may have been just for geographic reasons.

* * *

[*105] Q. Okay. Let me rephrase it. Do you remember Senator Cooper, for example, saying that the 12th District as created in the plan was not majority black and therefore the requirements of *Shaw V Reno* would not apply?

A. I remember he said that kind of after the fact, but I don't recall that that was ever stated as a goal.

Q. And when you say -- I'm sorry, go ahead.

A. I think after the plan was -- had already been developed -- and I don't remember whether it was the Senate plan that he was referring to or the compromise plan that he was referring to, but what I remember is that -- that it was a hindsight statement, it wasn't something that was a goal.

Q. So there was a plan and he was talking about that and in that context making that comment?

A. As a justification -- as a defense of the plan, not as a reason for having created it.

Q. Did you agree with that defense?

A. Honestly, my opinion is that the case law in that area is somewhat of a muddle. I haven't kept up with reading all of the cases and I don't believe that I either agreed or disagreed. I thought it was a plausible argument.

[*106] Q. Do you know whether or not he obtained any sort of legal advice before he made that statement on the floor?

A. I don't know.

Q. Are you aware of any advice that was ever given to either the members of the Redistricting Committee or anyone in the General Assembly to the affect that the12th District might be subject to strict scrutiny even though it was not created as a majority black district?

A. I think that Senatcr Alran said that you said that.

Q. Yeah, so -- so that was --

A. And I think it was Senator Cooper was responding to Senator Alran's having said that you said it in a floor debate.

Q. So he took that position in response to something I was alleged to have said?

A. I can't say what motivated him, but my memory is that Senator Alran said that on the floor as a reason to vote against the plan and Senator Cooper responded in a floor debate saying that he disagreed with you.

* * *

[*108] Q. Okay. Fine. What about predominantly race based, what does that mean to you?

A. That the primary motivation for creating it was to achieve either some racial separation or some racial percentage or some racial mix or something that had to do with race.

Q. And if some other justification or reason is offered then it's perfectly permissible to have it as race based [*109] as one chooses?

A. That's a question of law, I think.

Q. Well, in other words could the General Assembly take another look -- the new General Assembly that was elected in 1996, take another look at the 1992 plan and say we like the results that were generated under that plan, we're going to reenact it and it's no longer race based, would that be permissible, in your opinion?

A. I think it would just be a question of fact whether that was a pretext or whether they really had some other non-racial reason for doing it, but that's not what we did.

Q. So as long as it was not a pretext, it would be permissible to do that in your opinion, it would be a factual issue?

A. It's my understanding of the case that they inferred from the shape that it was racially -- race based, but that I suppose it would have been possible to prove that it wasn't. In that case in 1992 it clearly was race based since the Justice Department had told us that we had to draw a majority black district, so there was no point in trying to prove that it wasn't.

* * *

[*111] Q. Well, what would be your understanding of a term like core, maintaining the core?

A. That -- and it's subjective, but for any -- for any incumbent you would have a constituent base that you considered to be your core constituent base and that -- that you would like to keep if the district was modified. Now, I don't know that we did that in this case. I'm -- as a matter of fact I don't think we did do it in all cases in this case. For example, Eva Clayton may have thought that the black communities of Fayetteville and Wilmington were part of her core constituent base and she didn't keep them. Mel Watt may have thought that the black community of Durham was one of his core constituent bases and he didn't keep that. So I don't think that we in fact did maintain the core of all these districts.

* * *

[*129] Q. I see, okay. Now, Senator Cooper has referred to accepting certain data from the National Committee for an Effective Congress. Did you receive -- were you a participant in receiving any such data, did you have any [*130] contact with that committee that you recall?

A. I was a secondary recipient of it.

Q. I'm sorry?

A. I didn't talk to them myself but Senator Cooper shared their reports with me.

Q. Okay. Do you remember the nature of that data and how it was used?

A. We thought it was a more reliable indicator of the

partisan balance of a district than voter registration was. I didn't think voter registration was very useful information, because in North Carolina more and more registered democrats don't always vote democrat, so having -- and as you know the election data that we had on the legislative computer was very old, so having access to more current election data was useful to determine partisan.

Q. Do you remember any particular insights you received from that data and tried to use in drawing the '97 plan?

A. By 1997 the congressional delegation had six democrats and six republicans, and it seemed apparent to me that if we were going to get a plan adopted by the House which was the majority republican and the Senate which was the majority democrat that the only plausible way to do that was to have a plan that had six districts that were at least leaning democrat and six districts that [*131] were at least leaning republican.

Q. Now, when you started the process or you were drawing some plans in the summer of 1996 the balance was 8/4 republican, wasn't it?

A. Right.

Q. Then it became 6/6 as of November, 1996.

A. Right.

Q. When you were drawing the plan, did you or Senator Cooper -- this is the '97 plan. Did you know that Congressman Hefner was going to be leaving?

A. I don't think we did. I don't think we knew that. I don't even think we knew it when we were drawing the '98 plan.

Q. And so that district was left the same in both plans in any event?

A. Well, there was no need to change it between '97 and

'98, but one of the complications is that I believe that Senator Hefner lives in the corner of Cabarrus County that's close to Mecklenburg County, so we didn't want to put him in the -- we wanted to keep him in his own Congressional District.

* * *

[*132] Q. Going back to the preserving partisan balance. After Hefner retired that district in the last election went republican, if you were trying to preserve partisan balance, why didn't you strengthen the democratic character of Hefner's district when you were drawing the '97 plan and '98 plan?

A. Well, I think that that district is the democratic leaning district. You know, there are no guarantees in [*133] this game, but you had a very strong widely known popular republican candidate and a democratic candidate that didn't mount much of a campaign. Nobody said that we were drawing districts that would be guaranteed to go one way or the other and I don't think we were even trying to guarantee safe seats, but we were trying to create some balance between what you would call safe seats, swing seats and safe seats the other way, and I don't know, I don't think that you can conclude anything from the fact that Robin Hayes won that district, and he may not keep it, who knows.

Q. So your conclusion is that under the circumstances then the drawing of the district from which Hefner -- well, the drawing of that district in which Hefner was serving was done in a manner that would give him pretty good assurance -- it would be democratic leaning at least you would say?

A. It was democratic leaning, and as you look around the

borders of it, I don't see anything right on the edge of it that would have made it more democratic that wouldn't have hurt the 7th District.

Q. What about adding some of the democrats from Mecklenburg County?

A. Well, the part of the Mecklenburg County that borders on the 8th District is not democratic.

[*134]Q. So you're saying there was no way to add the Mecklenburg democrats and take some out of the --

A. Not unless you were going to do a polka-dot.

Q. With respect to --

A. Let me be more specific. Mecklenburg County along the Union Mecklenburg line is highly republican.

Q. Okay. And --

A. And also on the Cabarrus Mecklenburg line it is leaning republican. And I guess it's possible that there might be -- that you could put Davidson Town into it, but then Mecklenburg would have been divided into three districts, which was something that we absolutely didn't want to do.

Q. Now, the town of Davidson currently is in the 12th District?

A. Right.

Q. Is all of it or is it split or do you recall?

A. I believe it all is. But we absolutely didn't -- and one of the real complaints we had had from the '92 plan was that Mecklenburg was divided into three congressional districts with just a tiny little bit of it in the 8th, and people really didn't like that.

* * *

[*135] Q. There's a phrase that's been used from time to time, functional compactness. What do you interpret that to [*136] mean or have you used that phrase at all yourself?

A. Yes.

Q. And when you used it, what did you mean?

A. Well, I used it in the context of a case I handled in Columbus County in the early 1990s, in which what we meant then was that although the black community was split between two towns, I believe Taber City and Whiteville, that they shared a black community leadership, they shared a community of interest, that it was -- that there was easy communication between them, wasn't quite as hard to get from one place to the other and that they had some shared political concerns and that therefore they were functionally compact, and Judge Brett agreed with that. I think it was Taber City and Whiteville.

Q. So it was in that context that you used it in the past?

A. What I think it means is that -- that it's more important whether it ends up being a district that you can successfully represent than it is precisely what shape the district is, which is just -- which doesn't have anything to do with democracy or representation. But let me add that I haven't done any legal research on that theory since 1991 or 2 or whenever that was I did that case.

* * *

[*138] Q. You did not, okay. In consideration of the Cochrane proposal, Senator Cochrane's proposal, did you consider what alternatives might exist in terms of drawing a

district that would go from Charlotte toward the -- toward the east and include some of the counties there instead of going up to Greensboro and Winston Salem?

A. I considered Senator Cochrane's proposal.

Q. And did you consider perhaps modifications of it, whether something could be better constructed, not necessarily what she had but something that would move between Charlotte and the Eastern part of the state and would constitute a desirable district?

A. Let me answer that in two ways. She did not consult with me in developing her plan, so I didn't have an opportunity to say why don't you try moving it this way or that way or add this or subtract that. She did not consult with me. In general I would say that I am familiar with Union, Anson, Robeson, Scotland, and Cumberland Counties and that I do not think that **[*139]** they bear much in common with what I know of Mecklenburg County. They are rural, agrarian, military, have bad roads. The roads are getting a little better but at that point in particular it was very hard to get from here to there, they -- their housing and health care and economic problems were substantially different from Mecklenburg's, although in recent years we've had a little Suburban creep into Union County, but that's also recent, whereas the Piedmont Crescent is a name that's been around, wasn't invented for this District, it's been around for a long time. You know, there actually is a fault line that -- where the soil changes and the economy changes and we're on one side of it and Anson County is on the other side, whereas this whole Piedmont Crescent has the same kind of textile history more industrialized, more urban now, more banking, more electronics, more universities, and although the

people make fun of the roads, the roads do make it an easy district to represent, because you can have district meetings that -- with the '97 plan you have a district meeting in Salisbury and everybody in the whole district can get there in an hour, so it -- the northern route always made more sense to me and I never-- from a constitutional viewpoint I never could understand why a Court would care whether you went north or east. I **[*140]** didn't view any constitutional significance of that question.

Q. With respect to -- you mentioned Salisbury when you considered a desirable change that in the 1998 plan all of Rowan County is in one district instead of being split?

A. Personally, honestly I thought it was a ridiculous change, but it was very clear to me that that's what the Court wanted to see. And if you were trying to get a Court approval-- the notion that it mattered to this district that we included southern rural Rowan County did nothing to enhance the district from a viewpoint of making it a good district to represent or anything like that. It made it prettier, there's no question about that, but I didn't -- I thought it -- it was really six of one half dozen of the other. I really didn't think it made an difference in the district. It didn't have very many people in it.

Q. Don't you think it makes a difference to have all of one county in one district to whatever extent feasible?

A. Actually, personally I do not. I've never been a big advocate of keeping counties whole. I think the role of counties is overrated in this debate. I think it was much better for Mecklenburg County to be divided than it would be to have it whole, that it has absolutely **[*141]** enhanced our representation in Washington by having a republican and a

democrat who sort of -- we've doubled our umph. We have one person that can talk to the administration, somebody else that can talk to the leadership of the House. We get two different perspectives. I see no disadvantages and numerous advantages to having your county divided.

Q. And would that be equally true with having the City of Charlotte divided or the City of Winston Salem or some other city?

A. I just don't think it matters.

Q. Do you remember whether one of the goals were stated -- whether there was any goals stated of not dividing political subdivisions or not dividing counties, whether that was one of the goals stated at any time in regard to the plan?

A. Let me say this. There was a goal of not dividing precincts, which I think was a very important goal, because when you divide a precinct it's hard for people to know who their representative is and you have to like say well if you live on the east side of Jones Street you have this representative but if you live on the side of it south of -- and it's very confusing just to even tell somebody who their representative is, so I think that dividing precincts is something that's good [*142] to avoid. I think that dividing -- I've heard some rural legislators say that if you divide a little teeny tiny county up that they end up feeling like they don't have any impact at anybody's district, and I've thought that that was a legitimate consideration, but in terms of as a general matter do I think it's bad to divide counties, I don't think it's bad but I do recognize that it's more politically popular not to, that I'm somewhat in the -- that there are people that disagree with me.

Q. You've heard the phrase traditional districting

principles, have you ever heard that being used?

A. Well if you talk about traditional districting principals in terms of decades, traditionally we didn't care about one person one vote.

Q. Well I'm talking about in the context of compactness, contiguousness and not dividing political subdivisions. Have you ever heard any of those referred to as traditional districting principles?

A. I don't think that not dividing whatever that last thing you said was.

Q. Political subdivisions.

A. I don't think that is a traditional districting principal. Well, and I guess prior to 1980 the North Carolina constitution said you couldn't divide counties and districting the legislature but the Justice [*143] Department objected to that, that part of the constitution had never been pre-cleared.

Q. Now, the '97 plan, the 12th District has 6 out of 6 counties divided, and is it true that -- you don't think that's important one way or the other?

A. I do not find that to be problematic.

Q. And in the 1st District they've got 10 out of 22 divided and you don't find that problematic?

A. The piece that I find a little problematic is this little piece of Jones County that's split off, but of course that was done for political reasons, it wasn't done for racial reasons. It was done because -- what's his name -- Representative Jones wanted more of Pitt County in the 3rd so we had to add something and then you had to get the numbers to balance. But like Beaufort County is split and although you can't tell it from this map this is a big body of water right here and you can't

even get from this part of Beaufort County to that part of Beaufort County without going around this way. So I think dividing Beaufort County along that big body of water, which I'm embarrassed to say I cannot remember the name of, is not particularly problematic. I think that there are bad ways to do it but I don't think it is on its face bad.

Q. And by the way, I made a mistake when I said 10 out of [*144] the 22, I think it's 10 out of the 20 that are divided. And by the same token would you think it's perfectly okay to divide a town like Greenville and put the black portion of the town in the 1st District and the predominantly white in the 3rd?

A. Well you're making an assumption that the race was the motivation, which might be unconstitutional but --

Q. I'm just asking whether the fact that as divided it is divided along racial lines, whatever the reason for it, whether that in your view makes any difference.

A. Well I don't know whether that's true or not, but I don't find dividing a town in and of itself to be a bad practice.

Q. But the county is no problem?

A. As I said, I think there are bad ways to do it but I don't think it's necessarily a bad thing to do, and sometimes I think it's an affirmatively good thing to do.

Q. You mentioned the happy state when there are two congressmen who can represent Charlotte and Mecklenburg County. Would you feel the same way if the Congressmen from the 12th District were from Greensboro, Winston Salem instead of from Charlotte?

A. As long as he was -- he or she was responsive to me when I called him up it would be okay with me. Now I have to [*145] say that one of the things that I was concerned about in

the 12th District was keeping a substantial portion of Mecklenburg in it, because I thought that that would help Mel be reelected as opposed to having the heart of it shift north.

Q. The heart of it was Mecklenburg basically?

A. Well, I think not -- I don't think it's half, but somewhere close to half of it is Mecklenburg. And I thought that that -- that that would help Mel -- also Sue Myrick wanted a substantial part of Mecklenburg to be in her district, so we had to be careful to divide Mecklenburg in a way that both of them got a substantial hunk of Mecklenburg.

Q. And hopefully each of them got what they wanted, would that be true?

A. I doubt if either of them got precisely what they wanted but I think that both of them were okay with it.

* * *

[*146] Q. And do you recall some specific modifications that were made to Mecklenburg County and why they were made?

A. Well, one thing that we ended up trying to do was make sure -- make Gaston and Cleveland Counties whole, so if -- to do the one person one vote and end up with Gaston and Cleveland being even and not just needing like one precinct in Lincoln County or leaving one precinct out of one of those counties, the easiest way to do that was to figure -- to add their populations [*147] together and figure out how much of Mecklenburg needed to be in the 9th to get those two counties to be able to be whole and then put the rest of Mecklenburg in the12th. So to some extent the exact line between the 12th and

the 9th in Mecklenburg County had to do with how -- how it affected the population of the 9th District to be able to make that be a clean district. And when we changed it in the '98 plan we added more of Mecklenburg in the 12th than -- we added enough more to put all of Lincoln County into the 9th, so that -- that seemed a preferable way of doing it than having just a small fraction of a county into or out of the 9th.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,	)
Plaintiffs,	)
and	)
JAMES ARTHUR "ART" POPE, *et al.*,	)
Plaintiff-Intervenors,	)
v.	)
JAMES B. HUNT, JR., *et al.*,	)
Defendants,	)
and	)
RALPH GINGLES, *et al.*,	)
Defendant-Intervenors.	)

DEFENDANTS' MOTION TO CONSOLIDATE
Fed. R. Civ. P. 42(a)

Defendants' move the Court pursuant to Rule 42(a) of the Federal Rules of Civil Procedure to consolidate *Cromartie v. Hunt* (No. 4:96-CV-104-H2) (E.D.N.C.) and *Daly v. High* (No. 5:97-CV-750-BO) (E.D.N.C.) with this case for all purposes. In support of this motion, defendants rely on their memorandum filed herewith.

STANDARDS FOR DETERMINING MOTIONS TO CONSOLIDATE

Rule 42 motions are addressed to the court's broad discretion and provide a powerful tool for managing litigation to assure judicial economy, fairness and the interests of justice. *See* 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 42.10(3d ed. 1997). The sole legal requirement that must be met for invoking the Court;'s discretion is that the cases to be consolidated present common issues of law or fact. Generally this means only that the cases should be of "like nature." MOORE'S ¶ 42.10 [1][b], p. 42-10. Once this threshold is met, the Court should consider conservation of resources, fairness, and the interests of justice in deciding whether to exercise its broad discretion. MOORE'S ¶ 42.10[4], pp. 42-16 to -18.

CROMARTIE AND *DALEY* SHOULD BE CONSOLIDATED WITH THIS CASE

The threshold Rule 42(a) requirement that this case and *Cromartie* and *Daly* present common questions of law or fact is plainly met. The claims and legal theories advanced by the plaintiffs in this case are identical to the claims and legal theories advanced by the plaintiffs in *Cromartie* and *Daly*, and the facts found by this Court in ruling on the State's's 1992 congressional plan provide the necessary framework for determining whether the State's 1997 congressional plan cures or continues the defects in the 1992 plan. Moreover, the partial identity of the plaintiffs in this case and in *Cromartie* (Cromartie and Muse) and the complete identity of the defendant int his case and in *Cromartie* and in *Daly* make these cases "apt candidates for consolidation." *Hanes Cos. v.*

Ronson, 712 F. Supp. 1223, 1230 (M.D.N.C. 1988) (quoting 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2384 (1st ed. 1971)). *See also* MOORE'S ¶ 42.10 [1][c], p. 42-12.

The benefits which will result fro consolidation of these cases are compelling. There will be at least a fifty percent savings in judicial resources, a doubling of legal resources for the plaintiffs, and the elimination of duplicative or repetitive discovery demands. All of this can be achieved without any prejudice or unfairness to any party in any of the cases.

For these reasons, defendants request the Court to enter an order consolidating *Cromartie* and *Daly* with this case for all purposes.

Respectfully submitted, this the 14th day of October, 1997.

MICHAEL F. EASLEY
ATTORNEY GENERAL
/s/ Edwin M. Speas, Jr.
Senior Deputy Attorney General
N.C. State Bar No. 4112

/s/ Tiare B. Smiley
Special Deputy Attorney General
N.C. State Bar No. 7719

North Carolina Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing **Defendants' Motion to Consolidate** and **Defendants' Memorandum in Support of Their Motion to Consolidate** in the above-captioned action upon all parties to this case, *Cromartie* and *Daly* by depositing a copy in the United States mail, first-class postage prepaid, addressed as follows:

Mr. Robinson O. Everett
Post Office Box 586
Durham, NC 27702

Thomas A. Farr
Maupin, Taylor, Ellis & Adams, P.A.
Highwoods Tower One
3200 Beechleaf Court, Suite 500
Raleigh, NC 27619

Ms. Anita S. Hodgkiss
Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A.
Suite 300
741 Kenilworth Avenue
Post Office Box 36486
Charlotte, NC 28236-6486

Mr. Nathanael K. Pendley
Post Office Box 30070
Winston-Salem, NC 27130-0070

This the 14th day of October, 1997.

/s/Tiare B. Smiley
Special Deputy Attorney General

[This page intentionally left blank.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,)
Plaintiffs.)
and)
JAMES ARTHUR "ART" POPE, *et al.*,)
Plaintiff-Intervenors,)
v.)
JAMES B. HUNT, JR., *et al.*,)
Defendants.)
and)
RALPH GINGLES, *et al.*,)
Defendant-Intervenors.

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE

This memorandum is submitted by defendants in support of their motion to consolidate *Cromartie v. Hunt* (No. 4:96-CV-104-H2)(E.D.N.C.) and *Daly v. High* (No. 5:97-CV-750-BO) (E.D.N.C.) with this case for all purposes.

CASES TO BE CONSOLIDATED WITH THIS CASE

A. *Cromartie v. Hunt*. The complaint in this case was filed on July 3, 1996, by Robinson Everette on behalf of Martin Cromartie, Thomas Muse and Glennes Weeks claiming that North Carolina's *1st* Congressional District as contained in the State's 1992 congressional redistricting plan was an

unconstitutional racial gerrymander.[1] The defendants in *Cromartie*, as in this case, are the Governor and the State Board of Elections. By a series of consent orders, all proceedings in *Cromartie* have been stayed. On October 11, 1997, however, Mr. Everette moved the Court to dissolve the current stay so that he may file an amended complaint on behalf of Mr. Cromartie, Mr. Muse and certain other plaintiffs claiming Districts 1 and 12 in the State's 1997 congressional redistricting plan are unconstitutional racial gerrymanders. That amended complaint was lodged, but not filed, with the Court pending the Court's lifting the stay.

B. *Daly v. High*. The complaint in this case was filed in the Western District sometime in 1996 but never served on defendants. On January 21, 1997, plaintiffs filed an amended complaint and served that amended complaint on the defendants who are essentially identical to the defendants in this case. In the amended complaint a number of citizens claimed that several districts in the State's 1992 congressional redistricting plan as well as certain districts in the State's 1992 legislative districting plans were unconstitutional racial gerrymanders. Defendants moved to dismiss the amended complaint for improper venue. Plaintiffs never responded to that motion, and by order dated August 27, 1997, venue was transferred to the Eastern District. On October 9, 1997, plaintiffs moved to amend their amended complaint. In their

---

[1] Mr. Cromartie, Mr. Muse and Ms. Weeks are also parties to *this* action having been added as plaintiffs by this Court's. July 11, 1996, order which allowed plaintiffs' motion to amend their complaint.

second amended complaint, plaintiffs seek to challenge Districts 1 and 12 in the State's 1997 congressional redistricting plan as well as several districts in the State's 1992 legislative redistricting plans. From the amended complaint it is plain that the focus of their congressional challenge is Districts 1 and 12.

STANDARDS FOR DETERMINING MOTIONS TO CONSOLIDATE

Rule 42 motions are addressed to the Court's broad discretion and provide a powerful tool for managing litigation to assure judicial economy, fairness and the interests of justice. *See* 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 42.10 (3d ed. 1997). The sole legal requirement that must be met for invoking the Court's discretion is that the cases to be consolidated present common issues of law or fact. Generally this means only that the cases should be of "like nature." MOORE'S ¶ 42.10 [1][b], p. 42-10. Once this threshold is met, the Court should consider conservation of resources, fairness, and the interests of justice in deciding whether to exercise its broad discretion. MOORE'S ¶ 42.10[4], pp. 42-16 to -18.

CROMARTIE AND *DALEY* SHOULD BE CONSOLIDATED WITH THIS CASE

The threshold Rule 42(a) requirement that this case and *Cromartie* and *Daly* present common questions of law or fact is plainly met. The claims and legal theories advanced by the plaintiffs in this case are identical to the claims and legal theories advanced by the plaintiffs in *Cromartie* and *Daly*, and the facts found by this Court in ruling on the State's 1992 congressional plan provide the necessary framework for determining whether the State's 1997 congressional plan cures

or continues the defects in the 1992 plan. Moreover, the partial identity of the plaintiffs in this case and in *Cromartie* (Cromartie and Muse) and the complete identity of the defendants in this case and in *Cromartie* and in *Daly* make these cases "apt candidates for consolidation." *Hanes Cos. v. Ronson*, 712 F. Supp. 1223, 1230 (M.D.N.C. 1988) (quoting 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2384 (1st ed. 1971)). *See also* MOORE'S ¶ 42.10 [I][c], p. 42-12.

The benefits which will result from consolidation of these cases are compelling. There will be at least a fifty percent savings in judicial resources, a doubling of legal resources for the plaintiffs, and the elimination of duplicative or repetitive discovery demands. All of this can be achieved without any prejudice or unfairness to any party in any of the cases.

For these reasons, defendants request the Court to enter an order consolidating *Cromartie* and *Daly* with this case for all purposes.

Respectfully submitted, this the 14th day of October, 1997.

MICHAEL F. EASLEY
ATTORNEY GENERAL

/s/ Edwin M. Speas, Jr.
Senior Deputy Attorney General
N.C. State Bar No. 4112

/s/ Tiare B. Smiley
Special Deputy Attorney General
N.C. State Bar No. 7719

NC Department of Justice
P. O. Box 629
Raleigh, NC 27602-0629
Telephone: (919) 716-6900

[This page intentionally left blank.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*, Plaintiffs.	)	
and	)	
JAMES ARTHUR "ART" POPE, *et al.*, Plaintiff-Intervenors,	)	
v.	)	**ORDER**
JAMES B. HUNT, JR., *et al.*, Defendants.	)	
and	)	
RALPH GINGLES, *et al.*, Defendant-Intervenors.	)	

Defendants' motion to consolidate *Cromartie v. Hunt* (No. 4:96-CV-104-H)(E.D.N.C.) and *Daly v. High* (No. 5:97-CV-750-BO) (E.D.N.C.) with the above-captioned matter is DENIED.

This 16 October 1997.

For the Court:

/s/ W. EARL BRITT
United States District Judge

Filed October 16, 1997

[This page intentionally left blank.]

TRIAL TESTIMONY OF GERRY COHEN, *SHAW V. HUNT*, 92-202-CIV-5BR (EXCERPTS)

[*341] Q. Mr. Cohen, you testified yesterday about the genesis of the Peeler Plan put on the legislative computer system. Are maps 418 and 422 maps of the Peeler Plan?

A. Yes, those two maps are maps of the Peeler Plan.

Q. All right. And does the Peeler Plan contain two majority minority districts?

A. Yes, it does.

Q. Where are they located, generally?

A. One of them is located, beginning in Charlotte, up [*342] through Statesville, east through Salisbury, and on through Greensboro to Durham, and then several counties north of Durham along the Virginia border.

The second starts in Warren County, runs through much of the eastern part of the state, down to New Bern, Wilmington and Fayetteville.

Q. All right. Without repeating too much of yesterday's testimony, could you indicate, briefly, what were the first major changes you made to the Peeler Plan?

A. The first two major changes that I made in the Peeler Plan was adding a large portion of Winston-Salem, as I mentioned yesterday, along the goal of adding another urban area as requested by Mr. Robert Hunter, and also making the district more urban.

At the same time, portions of four counties along the Virginia border were removed; Caswell, Person, Granville and Vance.

Q. You explained yesterday using Exhibits 406 and 407, your reference to population?

A. Yes. At that point, we ran a report looking at the population of which cities were in that district, and looked at those tables I was referring to, just before adjournment of the Court yesterday, as to which cities were sized to be considered urban in North Carolina context, the largest 25 incorporated places. [*343] And I noticed that approximately 80 percent of the12th District was in communities, incorporated places of 20,000 or over; whereas, about 80 percent of the population of the 1st District was in places of 20,000 or under. Seemed to be co-existent of a suggestion of public hearing the 12th District be urban in nature.

Q. When you used the population statistics in Exhibits 406 and 407, were you just looking at the black population statistics?

A. No, I wasn't looking at them at all. I was looking at the report of the total population of the 12th and 1st District -- that were in the 1st and 12th Districts, not at the racial classification of any of the populations.

Q. All right. Did this urban/rural concept guide your efforts, your later efforts on the plan?

Mr. Farr: Objection.

Judge Phillips: Overruled.

A. Yes, it was a central part of the plans for finishing the Redistricting Plan from that point forward.

Q. And did you discuss this urban/rural concept with the leadership?

A. Yes. After noticing it myself, I did report that finding in discussion with the leadership.

Q. In your own view, are there similarities or commonalities of interest in the urban areas of the 12th?

[*344] Mr. Farr: Objection.

Judge Phillips: Overruled.

A. Yes. From my knowledge and experience, both from being Director of Bill Drafting, and also from studies that I worked on in 1982 and 1983. I have been Staff Counsel to a legislative study commission on the North Carolina railroad, where I was required, and did, spend, several weeks traveling along the railroad corridor from Charlotte on through Durham, and then onto Goldsboro and Morehead City. And made a lot of observations at that point about the nature of a lot of these counties in this area, especially the urban counties. And I felt then, as I do now, that there are major similarities between the communities, the urban communities and Piedmont Urban Crescent, all of which are from Durham west are in the 12th District.

* * *

[*347] Q. All right. Gerry -- Mr. Cohen, as you worked on Redistricting in the '90's, were you familiar with the existing districts in the 1980's of the Congressional Districts?

A. Yes, I was familiar with them.

Q. Did you know where the incumbents lived?

A. Yes, I do. And did.

Q. And did you give any consideration to where the incumbents lived or what might be called the core of their districts?

A. Yes. One of the factors used in my drawing of the Plan was to have each incumbent member of congress be in a separate district from each other, no pairing. In the second

ones, to the extent possible, while creating two [*348] minority districts and keeping them urban and rural, also to preserve the core of existing districts.

Q. And did you use the same district numbers for incumbents?

A. Yes. The district numbers in Chapter 7 are the same district numbers that each incumbent congressman had in the prior decade, with the exception, of course, of the 12th District, which was an open seat.

* * *

[*402] Q. In the enacted plan, you drew two majority black districts?

A. Yes, I did.

Q. Was race a factor in drawing those districts?

A. Yes, it was.

Q. Was race the sole factor?

A. No, it was not.

Mr. Farr: Objection.

Judge Phillips: Overruled.

A. No, it was not. There were a number of other factors that I discussed, chords of existing districts, presuming the opportunities of incumbent congressmen to be reelected, accommodating concerns of individual legislators, members of Congress, committee chairs, other things that I covered in my testimony already.

Q. Does that include the urban/rural analysis?

A. Yes, and including the keeping the 1st and 12th District, one very urban in nature and the other very rural in nature.

* * *

[*420] Q. Q. Mr. Cohen, I think you testified yesterday that when drafting what became Chapter 7, that one of your jobs was not to screw Republicans?

A. Yes.

[*421] Q. Isn't it true, Mr. Cohen, one of your other jobs was to make sure you protected the incumbent Democratic congressmen?

A. Yes.

Q. And Mr. Cohen, if the Republicans ended up getting screwed a little along the way, you wouldn't lose your job; is that correct?

Ms. Smiley: Objection to the form of the question.

Judge Phillips: Overruled.

A. My objective in protecting incumbent Democratic congressmen was to try to preserve – my understanding was to preserve the general partisan balance of the delegation as it existed in the 1980's, not shift it dramatically one way or the other, as various different alternatives might have done.

* * *

[*466] Q. And in your view, Mr. Cohen, in the enacted plan, would you describe District 1 and District 12 as being geographically compact?

A. Well, my definition of geographical includes political, economic geography. Geography, in my view, is not just maps; it includes the entire totality of the political process. Geography isn't just county names.

From the context of – you asked me about the 1st and 12th in the enacted plan or just the first-

Q. 1st and 12th?

A. I believe, from the context of political geography, communities of interest, commonalities of interest, that those districts are, in fact, compact because they put together persons with commonalities of interest with common history, common factors, tying different parts of the districts together.

* * *

[*468] Q. You prepared a statement in that submission; *Gingles* requires a district be geographically compact in order to satisfy one of the prongs of the initial test?

A. Yes.

Q. When you made that statement, Mr. Cohen, were you using compactness to mean geographically compact or the definition of compactness that you just gave us a few minutes ago?

A. I was dealing with my definition of compactness as I knew from alternative plans that I had seen at that point in time, which included through the Balmer 8.1 Plan, but didn't include the enacted plans.

I believe at that point, in commenting there, I was commenting on geographical compactness more in the lines of the map making sense.

[*469] Q. Okay. And, Mr. Cohen, would you agree that there are situations where minority districts cannot be drawn because the majority population is geographically dispersed?

A. I don't think that it's geographical dispersion. My view at this point about compactness is that geographical dispersion does not have an absolute, at least insofar as it's been crossed by Chapter 7.

Q. Could you please turn to page twenty-nine of Exhibit 425?

A. Yes.

Q. Is it fair to say on page twenty-nine you were responding to a comment that the ACLU made about Legislative Districts?

A. Yes.

Q. Did you not say that another district couldn't be drawn because black population was geographically dispersed?

A. I think there's a difference between standard of compactness that I would apply in the state Legislative Districts and Congressional Districts because of the, you know, part time nature of legislators, the absence of any staff, as opposed to Congressional Districts where members of Congress have far different resources at their behest and abilities to communication through different parts of **[*470]** their district.

* * *

[*470] Q. Mr. Cohen, I think when we broke up I asked you a question; I think you gave the explanation. I would like to ask you again.

A. All right.

Q. Do you not agree there were circumstances where the geographic – the dispersion of the population concentrations preclude – exclude the creation of majority minority district?

A. Yes. There are situations where geography could be a deciding factor in that.

Q. Okay. And don't you also agree, as you understand the voting rights act, that act did not require the state to stitch together geographically dispersed black population centers?

A. I agree with that; although, as I have said, my definition of geographical compactness includes the communities as compact if they share commonalities of interest. So, yes, I still agree with that statement.

* * *

[*488] Q. We have Exhibit 302 up here, Mr. Cohen. This is a map of the enacted plan?

A. Yes.

Q. Would you agree that District 1 and District 12 are materially stranger in appearance than at least some of the other districts in Chapter 7?

A. From the context of compactness that I have used, including commonalities of interest and communities of interest. I think those two districts and the 4th District are the most compact in the state in terms of political communities.

Q. That wasn't the question I asked you.

A. I answered the opposite way. No, it's not the least compact.

Q. Let me ask it again. I'm not sure what your answer was. My question was, do you agree that the 1st and 12th Districts are materially stranger in appearance on that map

than at least some of the other districts as reflected on the map?

A. Materially stranger in appearance, yes. I agree that [*489] it is materially stranger in appearance, yes.

* * *

[*497] Q. All right. Mr. Cohen, I now want to ask you about the chronology of events related to the objection letter that was received related to Chapter 601?

A. Yes.

Q. Is it not true that you attended a meeting with the Justice Department officials on December 17, 1991, in Washington, D.C.?

A. Yes, it is true.

[*498] Q. And Senator Winner, Speaker Blue, Representative Fitch were present at that meeting with you?

A. Yes.

Q. John Dunne, at that point in time, hope I get his title right. Was he the Assistant Attorney General for Civil Rights?

A. I'm not sure of his title.

Q. Did you get the impression he was in charge of the Voting Rights Section for the Justice Department?

A. I got the impression he was making the decision. On the title, whatever title you have to have to do that.

Q. Since the general population of North Carolina was 23 to 24 percent black, it would be fair to have two majority minority districts?

A. He posed it as a question to us. I recall his words were, North Carolina is about 23 or 24 percent black and the plan you submit to us, only one out of the 12 districts or eight percent are black. Don't you think it would be more fair to have two. That it would more roughly reflect the state's population. I recall him asking that as a question, which is more or less of the same as to what you said.

* * *

[*543] Q. Mr. Cohen, you spoke of creating a rural district and an urban district?

A. Yes, sir.

Q. You meant a rural black and urban black; is that correct?

[*544] A. Yes.

DEPOSITION TRANSCRIPT OF GERRY COHEN IN *SHAW V. HUNT*, 92-202-CIV-5-BR (EXCERPTS)

Q Okay. Basically I was asking you about what the percentage was that you were using in the--what percentage of minority, of black, you were using in the second plan, and you might compare that with the percentage you used in the first plan.

A Well, I stated--you asked what was used. Numbers that were used were higher than in the first plan. In the case of the 1st District, it was 57.26 percent black total population, District 12, 56.63 black in total population. And those numbers were designed to meet the requirements of Section 2 of the Voting Rights Act that blacks have an opportunity to elect a candidate of their choice.

To be of their choice, it would seem to be mathematically necessary that it be over a majority so that the "they" making a choice would be a majority, and then somewhat [*76] higher than that to account for the fact that blacks tend to be of a lower average age than whites because of both longevity and birth rates thus that the voting age population in the 1st District was 53.4 black, in the 12th District, 53.34 percent black, and also knowledge that black voter registration tends to lag behind whites and that black voting turnout tends to lag behind white. So all of those require the number to be somewhat higher than 50 percent.

Q So that---

A (interposing) We felt that--to finish answering the question, we felt that these numbers met the requirements of Section 2.

Q Is there a requirement in Section 2, an explicit requirement, that there be a majority--the creation of a majority minority district?

A My understanding from having read the Act and the House and Senate Conference Committee documents is that yes, reading all those documents together.

Q That was the---

A (interposing) That is the legal interpretation that I have based my actions answering--getting the result and answering your question, yes.

Q And so then you proceeded--now, were you in turn instructed this was a requirement or was this something you formulated on your own as to the--in other words, you say [*77] what you construed Section 2 to mean and that it required the creation of the type of majority minority district you have just indicated?

A I think it was, described without violating any privileges, a common statement that was I believe made and accepted by all of the persons on various sides participating in the legislative deliberations, that in order for minorities to have an opportunity to elect a candidate of their choice, as we understood Section 2 to require, that it had to be over a majority.

Q Did the Justice Department indicate that that was their interpretation?

A Certainly from their actions, yes.

Q And the Justice Department indicated by their actions and otherwise that they would not approve--that is, not preclear under Section 5 unless there was a creation of two majority minority districts?

* * *

[*188] Q Are there any minority concentrations, in particular urban blacks, that could have been put into District 12 because of proximity to District 12, but rather were split off into an adjacent district?

A Not of any majority. I mean, there are some precincts that are in a, you know, 25 to 30 percent black area that are on the fringe of the black community that are not in the 12th District, but no--none of the core of any black community, no. And you are talking about the counties that are in the 12th District in the enacted plan?

Q I am talking---

A And your question was, was anything divided in any of those counties that wasn't put in the majority black district, in the counties that were divided in the 12th District?

Q My question is, are there any minority concentrations, such as were there any urban blacks put into Congressman Neal's district?

A Not substantially. As I have testified, there are some precincts that are, you know, I think 25, 30-some percent black in Winston-Salem that remained in the 5th [*189] District. But the majority black precincts in Winston-Salem, the core of the urban black community, the most urban part of Winston-Salem as opposed to some suburban areas, were put in the 12th District. I mean, not every black voter in Winston-Salem is in the 12th District.

Q But---

A So to that extent, there was certainly division, but not every--you know, there is a core of precincts in Winston-Salem that are 98 to 100 percent black. That core of the community is all in the 12th District. But areas that were, you know, 25 to 33 percent black that aren't in the core of the black community were not necessarily in the 5th District, to speak specifically about Forsyth County.

Q Well, were the precincts that had significant--and by "significant" I would view 20 percent, in that range, as significant. Were there precincts that ended up in Neal's district that were originally in the 12th District in the Peeler plan?

A No, none of Forsyth County was in the 12th District in the Peeler plan. Would it help if I pointed to you on the map Forsyth County in the Peeler plan? This is Forsyth County in the Peeler plan (indicating). None of the 12th District is in it.

(Counsel confer.)

Q Mr. Cohen, at any juncture in the legislative [*190] process between the submission of the Peeler plan, the promulgation of the Peeler plan and the passage of Chapter 7, did you draft a plan that put minority concentrations in Winston-Salem that are now in the Neal district into District 12?

A Yes.

Q And why were they subsequently removed from District 12?

A To help increase--to make the stated goal of increasing the majority black percentage. If you are trying to--mathematically if you are trying to build a district that is 56 to

57 percent black, it doesn't help that goal to have a number of precincts that are 33 or 40 percent black.

Q But weren't those 33 or 34 percent or 40 percent black precincts sufficiently urban? Weren't they urban?

A Yes, they were urban, but there were areas elsewhere--I do not remember--I think there were maybe three or four precincts that were changed between--one of the sort that I describe as interim. There were a number of plans in the record in between the Peeler plan and the enacted plan that had three or four more precincts.

And you are still working on the goal of increasing the urbanness of the district and increasing the majority percentage black so that it was as high or higher than the first district that was rejected in Chapter 601. And those [*191] precincts were removed because they were less than majority black in a district where the goal was to have a number that was 56 or 57 percent.

Q So in effect, the principal motivation was not urbanness, but blackness?

A The principal motivation for taking those precincts out; is that your question---

Q (interposing) Yes.

A ---or the principal motivation for what?

Q For taking those precincts out of District 12.

A I am not really sure on the particular density of those particular precincts. I mean, precincts that are 20 to 30 percent black tend to be less dense than precincts that are 80, 90, 100 percent black because they tend to be very heavily concentrated, urban, often public housing, with very high densities, whereas precincts that are 20 to 30, 35, 40 percent

black are precincts that tend to be more suburban in nature and less population dense.

Now, I will also say that another factor--you asked if that was the only factor? What was your question again? Did you ask previously what was the reason?

Q Is there a difference in a community of interest between urban blacks and suburban blacks?

A No, but to the extent that changes resulted in more urban blacks--I believe that some of the changes may [*192] have been to add more black precincts, black areas in Charlotte to the district. And to the extent the changes simply put urban blacks in one county in and took urban blacks in another county out--it is the extent that maybe suburban blacks were taken out in one county and instead urban blacks were put in in another district that fostered that goal.

I am not testifying whether suburban or urban blacks have or don't have similar interests. I am saying that there were two different goals, increase urbanness and increase the black percentage, and---

DEPOSITION TRANSCRIPT OF GERRY COHEN IN *POPE V. BLUE*, 3:92-CV-71-P (EXCERPTS)

[*99] Q Assume you're a white Republican in the Chambersberg precinct in the Twelfth Congressional District –

A Yes.

Q What chance do you have of having someone who you identify with or support politically being elected in any congressional election during the next ten years?

Ms. Smiley: Objection to the form of the question and the content of the question.

A In any congressional district, there's going to be 45 percent of the people who are not black, roughly, and I refuse to accept any implication that a black legislator is less able to represent a white legislator – white constituent.

Q That wasn't my implication. If it was, I apologize. Let me rephrase it.

A Okay.

Q What chance does that white Republican have of electing a Republican candidate in the Twelfth District in the next eight years?

A Well, since the purpose of the Voting Rights Act is to allow minorities to elect a candidate of their choice that whatever minority districts there would be that there would be a corresponding less [*100] likelihood that a white candidate would have the – white would have an opportunity to elect a candidate of their choice. So the answer is nil. It has nothing to do with the characteristics of the Twelfth District. It has to do with the characteristics of the Voting Rights Act.

Q So would you agree that this white Republican in the

Chambersberg precinct that's in the Twelfth District that he might as well – there's no reason for him to vote for the next eight years for Congress, is there?

A I disagree with that entirely.

Q He can't have any effect on the election, can he?

A I don't think there's any voter that has no effect on an election. I think any congressman is responsive to the needs of his or her constituents. And I don't think that that voter will be ignored by the member of congress simply because of his or her race – the fact that that person is white.

Q Do you agree that there's very little, if any, chance of a Republican being elected in the Twelfth District?

A There is very little chance of a Republican being elected from any – there is very little chance of a white Republican being elected from any of the **[*101]** minority districts whether they be one or two in any proposed plan the General Assembly has considered, could consider, or any court could consider – that that is the purpose of the Voting Rights Act to – now if black voters would chose – now let me rephrase that – it's to allow black voters to elect a candidate of their choice. If the black voters wanted to elect a Republican candidate, they could. I note that in the Twelfth District, the candidates filed to date – either two, three or all three of those candidates are black.

Q Mr. Cohen, historically have not blacks voted in North Carolina about 90 percent Democrat?

A Yes.

Q So if voting trends continue, it's very unlikely that we'd have a black Republican nominated in the – or to win in the Twelfth Congressional District, would you agree with that?

A Unless the Democrats nominated a white, I would say yes, in that district.

Supreme Court, U.S.
FILED
SEP - 8 2000
CLERK

(5) (4)

Nos. 99-1864 and 99-1865

IN THE

Supreme Court of the United States

JAMES B. HUNT, JR., *et al.*,

Appellants

and

ALFRED SMALLWOOD, *et al.*,

Intervenor-appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

STATE APPELLANTS' BRIEF ON THE MERITS

MICHAEL F. EASLEY
North Carolina Attorney General
Tiare B. Smiley,* Special Deputy Attorney General
Norma S. Harrell, Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919) 716-6900

Walter E. Dellinger
Brian D. Boyle
Crystal Nix Hines
Jonathan D. Hacker
O'Melveny & Myers LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

September 8, 2000

**Counsel of Record*

55 f/o's

QUESTIONS PRESENTED

(1) Whether a federal court may strike down a state's redistricting plan by substituting its judgment for that of the state legislature, and without requiring the challengers to surmount their heavy burden of demonstrating that race, not politics, was the dominant and controlling rationale in drawing district lines and that traditional redistricting criteria were subordinated.

(2) Whether a final judgment from a court of competent jurisdiction, which holds that a state's congressional redistricting plan does not violate the constitutional rights of plaintiffs and authorizes the state to proceed with elections under it, preclude a later constitutional challenge to the same plan in a separate action brought by plaintiffs in privity with them.

LIST OF PARTIES

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, DENNIS WICKER in his official capacity as Lieutenant Governor of the State of North Carolina, HAROLD BRUBAKER in his official capacity as Speaker of the North Carolina House of Representatives, ELAINE MARSHALL in her official Capacity as Secretary of the State of North Carolina, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, and LARRY LEAKE, S. KATHERINE BURNETTE, FAIGER BLACKWELL, DOROTHY PRESSER, and JUNE YOUNGBLOOD in their capacity as the North Carolina State Board of Elections, are appellants in this case and were defendants below;

ALFRED SMALLWOOD, DAVID MOORE, WILLIAM M. HODGES, ROBERT L. DAVIS, JR., JAN VALDER, BARNEY OFFERMAN, VIRGINIA NEWELL, CHARLES LAMBETH, and GEORGE SIMKINS, are intervenor-appellants in this case and were intervenor-defendants below;

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, R.O. EVERETT, J.H. FROELICH, JAMES RONALD LINVILLE, SUSAN HARDAWAY, LOIS WEAVER, and JOEL K. BOURNE are appellees in this case and were plaintiffs below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

A. The 1997 Congressional Redistricting Process 1

B. Legal Proceedings 6

C. The District Court Opinion 7

SUMMARY OF ARGUMENT 8

I. CAREFUL SCRUTINY OF THE DECISION BELOW IS REQUIRED TO DETERMINE WHETHER PLAINTIFFS HAVE MET THEIR STRINGENT EVIDENTIARY BURDEN FOR PROVING A PREDOMINANT RACIAL MOTIVE. 13

A. Plaintiffs Must Proffer Compelling Evidence That Race Was The Dominant Factor In The District's Design. 13

B. A Rigorous Review Of The Record And Decision Below Is Required. 16

C. A Comparison Of The Evidence In This Case With That In Previous Cases Is Warranted. 18

TABLE OF CONTENTS
(continued)

Page

II. THE COURT IMPROPERLY CONCLUDED THAT RACE, NOT INCUMBENCY PROTECTON, WAS THE PREDOMINANT FACTOR IN THE DESIGN OF DISTRICT 12. 21

A. The Court Erroneously Discredited The State's Motives Based On Registration Data Rejected By The Legislature. 23

B. The Court Unreasonably Inferred A Predominant Racial Motive From Expert Testimony That Did Not Refute The State's Showing That Partisanship Predominated The District's Design. 25

C. The District's Shape Was Not Probative Circumstantial Evidence Of Motive Because The Shape Was Justifiable On Both Racial And Political Grounds 34

D. The Panel's Reliance On Isolated Statements By Legislators That Establish, At Most, That Race Was Considered Does Not Establish That Race Predominated 37

III. RECOGNIZED CLAIM PRECLUSION RULES BARRED PLAINTIFFS FROM CHALLENGING DISTRICT 12 41

A. The District Court in Shaw Entered a Final Judgment Holding the Revised District 12 Constitutional. 41

B. The Doctrine of Claim Preclusion Barred Plaintiffs' Successive Challenge to District 12. 43

TABLE OF CONTENTS
(continued)

Page

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

CASES

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 24

Allen v. McCurry,
449 U.S. 90 (1980) 43

Anderson v. City of Bessemer,
470 U.S. 564 (1985) 18

Bush v. Vera,
517 U.S. 952 (1996) ..... passim

Chapman v. Meier,
420 U.S. 1 (1975) 31

City of Mobile v. Bolden,
446 U.S. 55 (1980) 14

Commissioner of Internal Revenue v. Sunnen,
333 U.S. 591, 597 (1948) 43

Federated Department Stores v. Moitie,
452 U.S. 394 (1981) 43, 44

Growe v. Emison,
507 U.S. 25 (1993) 31

Henry v. C.I.R,
170 F.3d 1217 (9th Cir. 1999) 40

Hunt v. Cromartie,
526 U.S. 541 (1999) ..... passim

Jaffree v. Wallace,
837 F.2d 1461 (11th Cir. 1988) 45, 46

TABLE OF AUTHORITIES
(continued)

Page(s)

Jefferson v. Hackney,
406 U.S. 535 (1972) 16

Johnson v. Miller,
864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd*, 515 U.S. 801 (1997) 20

Johnson v. Miller,
922 F. Supp. 1556 (S.D. Ga. 1995), *aff'd sub nom., Abrams v. Johnson*, 521 U.S. 74 (1997) 36

Kilgarlin v. Hill,
386 U.S. 120 (1967) 49

Lawyer v. Department of Justice,
521 U.S. 567 (1997) 35, 37, 39

Llampallas v. Mini-Circuits, Inc.,
163 F.3d 1236 (11th Cir. 1998) 40

Los Angeles Branch NAACP v. Los Angeles Unified School District,
750 F.2d 731 (9th Cir. 1984) 45, 46, 49

Louisiana Seafood Management v. Foster,
53 F. Supp. 2d 872 (E.D. La. 1999) 48

Lucas v. Forty-Fourth General Assembly,
377 U.S. 713 (1964) 49

Lynch v. Donnelly,
465 U.S. 668 (1984) 37, 40

Miller v. Johnson,
515 U.S. 900 (1995) ..... passim

Mueller v. Allen,
463 U.S. 388 (1983) 21

TABLE OF AUTHORITIES
(continued)

Page(s)

NAACP v. Hunt,
891 F.2d 1555 (11th Cir. 1990).....45

NAACP, Minneapolis Branch v. Metropolitan Council,
125 F.3d 1171 (8th Cir. 1997), *cert. denied*, 525
U.S. 826 (1998).....45, 46

Personnel Administrator v. Feeney,
442 U.S. 256 (1979).....14, 24

Petit v. City of Chicago,
766 F. Supp. 607 (N.D. Ill. 1991).....45, 46, 47, 48

Purkett v. Elem,
514 U.S. 765 (1995).....14

Reynolds v. Sims,
377 U.S. 533 (1964).....49

Richards v. Jefferson County,
517 U.S. 793 (1996).....44, 45, 47, 48

Roman v. Sincock,
377 U.S. 695 (1964).....49

Shaw v. Hunt,
517 U.S. 899 (1996)..... passim

Shaw v. Hunt,
92-202-CIV-5-BR, Judgment (E.D.N.C.
September 15, 1997).....42

Shaw v. Hunt,
CA No. 92-202-CIV-5-BR, Order (E.D.N.C. June
9, 1997).....42

Shaw v. Reno,
509 U.S. 630 (1993)..... passim

TABLE OF AUTHORITIES
(continued)

Page(s)

Silver v. Diaz,
522 U.S. 801 (1997).....20

South Central Bell Telephone Co. v. Alabama,
526 U.S. 160 (1999).....47

St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993).....14

Thornburg v. Gingles,
478 U.S. 30 (1986).....18

Tyus v. Schoemehl,
93 F.3d 449 (8th Cir. 1996).....45, 46, 47, 48

United States v. Hays,
515 U.S. 737 (1995).....48

Uno v. City of Holyoke,
72 F.3d 973 (1st Cir. 1995).....18

Upham v. Seamon,
456 U.S. 37 (1982).....35

Vera v. Richards,
861 F. Supp. 1304 (S.D. Tex. 1994).....19

Voinovich v. Quilter,
507 U.S. 146 (1993).....18

Washington v. Davis,
426 U.S. 229 (1976).....13, 24

WMCA, Inc. v. Lomenzo,
377 U.S. 633 (1964).....49

Wright v. Rockefeller,
376 U.S. 52 (1964).....37

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

18 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* (2d ed. 1987).....43, 44, 46

STATE APPELLANTS' BRIEF ON THE MERITS

Governor James B. Hunt, Jr., and the other state defendants below appeal from the final judgment of the three-judge United States District Court for the Eastern District of North Carolina, dated March 7, 2000, which held that District 12 in the State's 1997 Congressional Plan is an unconstitutional gerrymander and enjoined the State from conducting any elections under that plan.

OPINIONS BELOW

The March 7, 2000, majority opinion of the district court and the concurring and dissenting opinion of the Honorable Lacy Thornburg, District Court Judge sitting by designation as Circuit Judge, which have not yet been reported, appear at J.S. 1a and 37a, respectively.[1]

JURISDICTION

The district court's judgment was entered on March 8, 2000. J.S. 71a. On March 10, 2000, the State appellants filed notice of appeal to this Court. J.S. 69a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISION INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment. J.S. 73a.

STATEMENT OF THE CASE

A. The 1997 Congressional Redistricting Process

Last term, a unanimous Court in *Hunt v. Cromartie*, 526 U.S. 541 (1999), held that the district court improperly granted summary judgment to plaintiffs in concluding that race was the "predominant factor" in the drawing of Congressional District 12, and remanded the case for trial. In so holding, the Court

---

[1] References to "J.S." are to the Appendix of the Jurisdictional Statement; references to "J.A." are to the Joint Appendix.

stated that:

> [e]vidence that blacks constitute even a super-majority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference.

Cromartie, 526 U.S. at 551-52.

The trial confirmed in substantial detail the legislature's constitutional engagement in political gerrymandering in making District 12 a strong Democratic district as part of its broader effort to preserve a six-six partisan balance in its congressional delegation. The General Assembly commenced the complex and difficult task of remedying the constitutional defects in the prior 1992 Plan,[2] while at the same time achieving its partisan political objectives. The General Assembly's redistricting efforts were complicated by the fact that political power was divided between a majority Democratic Senate and a majority Republican House. Indeed, when the redistricting process began, many did not believe that the politically divided legislature could successfully negotiate a plan and prevent redistricting from falling to the federal court by default.[3]

An essential aspect of designing a plan acceptable to the politically divided General Assembly was the protection of all twelve incumbents. This was done in part by preserving the constituent and partisan core of each district. Congresspersons and their representatives, as well as their supporters in the

[2] In *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996), this Court found that race predominated in the design of District 12 and that it could not survive strict scrutiny.

[3] J.S. 82a, 138a; J.A. 179-80, 240-41.

General Assembly, expressed their preferences throughout the redistricting process.[4] The legislature's task was particularly acute in the western part of the State because it is overwhelmingly Republican; the legislature was thus faced with the difficult challenge of creating loyal Democratic constituencies in Districts 8 and 12, while protecting the Republican strongholds in adjacent Districts 5, 6, 9 and 10. Any changes in the configuration of any of those districts could not undermine the strength of the existing incumbents or the passage of the plan would have been placed in jeopardy.[5]

To achieve its goals, the General Assembly established Senate and House redistricting committees to oversee the redistricting process. Senator Roy A. Cooper, III, a Democrat, was appointed Chairman of the Senate Redistricting Committee and Representative Edwin McMahan, a Republican, was appointed Chairman of the House Redistricting Committee. From the beginning, Cooper and McMahan recognized that the only way to reach a compromise was to craft a plan that, while curing the constitutional defects, also preserved the existing six-six partisan balance in the State's congressional delegation.[6] Because party registration is not a reliable predictor of voting behavior in North Carolina, the committees used the actual votes cast in a series of previous statewide elections to design Democratic and Republican districts.[7]

[4] *See, e.g.*, J.S. 83a-84a, 138a, 207a-10a; J.A. 180-86, 657.

[5] *See, e.g.*, J.S. 83a-86a; J.A. 182, 185-88, 191, 623-24, 634-35, 637-38.

[6] *See, e.g.*, J.S. 82a, 94a, 99a-100a, 138a; J.A. 180, 187-88, 235, 240-41, 406-07, 780.

[7] J.S. 206a-07a; J.A. 397, 779-80. *See also* J.S. 173a-74a. The redistricting computer database included voting results at the precinct level for three state races: the 1988 Lewis/Smith Court of Appeals election, the 1988 Rand/Gardner Lieutenant Governor election, and the 1990 Gantt/Helms United States Senate election. In addition, some more recent election results also were available to the committee chairman through other sources. J.S. 83a-84a, 138a-139a; J.A. 188-90. The results from the two

Computer software allowed the plan's drafters to view voting data by precinct, enabling them to move precincts and draw district boundaries throughout the State based on actual voting patterns.[8]

Acutely conscious of its legal obligations, the General Assembly sought to cure the defects in the 1992 plan by assuring that racial considerations did not predominate over traditional race-neutral redistricting criteria in the drawing of districts. The new plan was thus designed to: (1) avoid dividing precincts; (2) avoid dividing counties, except as needed to maintain partisan balance; (3) eliminate "cross-overs," point contiguity, long narrow corridors and other artificial means of maintaining contiguity; (4) group together citizens with similar needs and interests; and (5) ensure ease of communication between voters and their representatives. Although improving the overall appearance of District 12 and other districts was a major consideration in curing the defects found in the previous plan, mathematical measures of compactness were not utilized in constructing or evaluating the new plan.[9]

Other important legal requirements also influenced the design of the 1997 Plan. First and foremost were federal one person, one vote requirements, which meant that politically desirable precincts along the border of a proposed district sometimes could not be included in a district and still maintain

---

1988 elections were given the most weight by the legislature because they were a better test of generic party voting preferences. The judges' race, for example, involved candidates who were known to most voters only by their party affiliation. J.S. 206a-07a; J.A. 189. *See also* J.A. 611, 613, 652.

[8] *See, e.g.*, J.A. 518-20, 585-87.

[9] *See, e.g.*, J.S. 82a-84a, 138a; J.A. 179, 190-91, 200-01, 212-13, 382-83, 393-96, 405-06, 431, 464-65, 474, 476.

an acceptable population balance.[10] In addition, with respect to District 1, the legislature sought to comply with the requirements of the Voting Rights Act – an obligation that did not pertain to District 12 or the other districts.[11]

On March 31, 1997, a majority of representatives in both houses voted to enact the new congressional districting plan.[12] The most dramatic changes in the new plan are in District 12, which contains less than 70% of its original population and less than one-half (41.6%) of its original geographic area.[13] Although the House and Senate initially differed on the question of extending District 12 from the city of Charlotte in Mecklenburg County northward either to Winston-Salem (the Senate plan) or to High Point and Greensboro (the House plan), the legislature decided there was no logical reason not to include loyal Democratic voters from all three parts of District 12's Triad,[14] rather than effectively wasting their votes by putting them into districts that were overwhelmingly Republican.[15]

---

[10] *See, e.g.*, J.A. 613-14, 622, 625. Balancing populations sometimes served other purposes. For example, several precincts in Mecklenburg County were shaved off District 12 to increase the population of District 9 so it did not extend into Lincoln County, and that county could be made whole as part of District 10. J.A. 789-90.

[11] J.S. 85a-86a; J.A. 196, 384. *See also* J.A. 207-09, 385, 621.

[12] Although the 1997 Plan garnered bipartisan support in the divided chambers of the General Assembly, twelve of seventeen African-Americans in the House voted against the plan because they believed it did not adequately take into account the interests of the State's African-American citizens. J.S. 140a; J.A. 242-43.

[13] J.A. 16, 543-44.

[14] The Triad consists of Winston-Salem in Forsyth County, and Greensboro and High Point in Guilford County.

[15] J.A. 192-94, 216, 268, 389. The extension of District 12 to Greensboro boosted the percentage of Democratic voters, based on the two 1988 elections, by five percent. The percent of Democratic voters rose from

To the extent possible, consistent with the difficult task of creating a Democratic district in the predominantly Republican Piedmont Crescent, the 1997 Plan respects the traditional race-neutral redistricting criteria identified by the legislature: District 12 divides only one precinct, for partisan reasons; its appearance is greatly improved over the 1992 plan by being shorter, wider and no longer held together by reliance on artificial devices such as cross-overs and point contiguity. *See supra* note 9. It comprises a district joining together citizens with similar needs and interests in the urban and industrialized areas along the interstate highways that connect Charlotte and the Piedmont Urban Triad,[16] areas in which the bulk of the State's recent population growth has occurred.[17] Moreover, because District 12 is built around major transportation corridors, it functions effectively for representatives and constituents. With 43% of its voting-age population African-American, District 12 is not a majority-minority district.[18] District 12 is, however, a majority Democratic district.

B. Legal Proceedings

After the General Assembly enacted the 1997 Plan, and the 1998 election process had begun, plaintiffs filed suit, challenging the constitutionality of Districts 1 and 12. Plaintiffs moved for a preliminary injunction and for summary judgment. The district court, with Circuit Judge Sam J. Ervin, III, dissenting, granted summary judgment to plaintiffs, declared District 12 unconstitutional, and permanently enjoined the State from conducting any primary or general election under the 1997 Plan. After the State defendants appealed, this

---

57.48% to 62.20% in the Rand/Gardner election and from 56.59% to 61.46% in the Lewis/Smith election. J.S. 231a, 241a.

[16] *See, e.g.*, J.A. 383, 400-01, 421, 430, 465, 476.

[17] J.A. 151-52, 751.

[18] Only 46.7% of its total population and 45.6% of its registered voter population is African-American. J.S. 77a-79a.

Court reversed and remanded for trial. *Cromartie*, 526 U.S. at 554. On remand, the district court established a schedule for discovery and set a trial date. After the untimely death of Circuit Judge Sam J. Ervin, III, United States District Court Judge Lacy H. Thornburg was assigned to the three-judge panel.

C. The District Court Opinion

The three-judge panel unanimously ruled that District 1 was constitutionally drawn, but a majority ruled that District 12 was an unconstitutional racial gerrymander and enjoined its use in future elections. The majority began by crediting the State's testimony that the 1997 Plan was drawn to protect incumbents and preserve the partisan core of the existing districts. J.S. 11a. Nonetheless, the court rejected legislators' testimony that District 12 was drawn to fulfill those same partisan goals. Instead, in an opinion which substantially repeated its prior summary judgment opinion, *compare* J.S. 11a-19a *with* J.S. 247a-255a, the panel once again focused heavily on circumstantial evidence of the district's racial demographics and shape, and again, used registration data to impugn the state's motives, J.S. 23a-26a, even though legislators testified that they did not use such data in designing the districts because it was not a reliable predictor of voting behavior in North Carolina. *See supra* note 7. The panel also found significant the testimony of plaintiffs' expert, Dr. Weber, and several isolated statements made by one legislator and state official, which, it said, demonstrated a predominant racial motive in drawing the district. J.S. 26a-28a.

Judge Thornburg wrote a concurring and dissenting opinion. He agreed that District 1 was constitutional, while disagreeing with the majority's application of strict scrutiny.[19]

---

[19] The majority's application of strict scrutiny to District 1 is additional evidence of its misunderstanding of the predominance standard. District 1, which has an African-American population of 50.27%, respects traditional race-neutral redistricting criteria: it divides no precincts; it is compact; and

He dissented as to District 12, concluding that plaintiffs had completely failed to meet their burden of showing that race predominated in drawing the district. Defendants, in contrast, "produced ample and convincing evidence" establishing that legitimate "political concerns such as existing constituents, incumbency, voter performance, commonality of interests, and contiguity, not racial motivations, dominated the process surrounding the creation and adoption of the 1997 redistricting plan." J.S. 45a-46a.

SUMMARY OF ARGUMENT

The central issue in this case is whether race or partisan politics predominantly motivated the North Carolina legislature's design of District 12. In its opinion below, the district court agreed with the State that the General Assembly's 1997 redistricting plan was motivated by a desire to maintain a six-six partisan balance in the State's congressional delegation and to protect incumbents. J.S. 11a. The court also found that the design of District 12 fulfilled those objectives since the district is "one of the six predominantly Democratic districts established by the 1997 Plan to maintain the 6-6 partisan division." *Id.* at 11a-12a. Despite those incontestable findings, the court nevertheless concluded that District 12's lines were drawn predominantly on racial, not political grounds. That conclusion is completely at odds with the

---

artificial devices such as crossovers and point contiguity were eliminated. Irregularities in the district lines are the result of incumbency protection and other political concerns. J.S. 84a-86a; J.A. 197-200, 232-33, 465. It comprises a district with a community of voters defined by shared interests in the mostly rural and economically depressed counties in the State's northern and central Coastal Plain. J.S. 84a-87a; J.A. 200, 475. The district encompasses an area where the African-American population is sufficiently large and geographically compact to constitute a majority in a district, as the court below recognized. J.S. 33a-34a. Except for its concern that the split counties and towns in District 1 correlated with race, the court did not find that race predominated over other traditional redistricting principles in the design of District 1, yet needlessly applied strict scrutiny.

record.

This Court's precedents make clear that plaintiffs bear the burden of proving the unconstitutionality of a state's redistricting plan. To establish an equal protection violation, plaintiffs must show not simply that race was a possible explanation for the district's lines, or even that the district's boundaries correlate closely with race, but rather that the State's asserted predominant nonracial explanation for the district's design is pretextual, and that the primary motivation is racial. "If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify." *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion); *see Cromartie*, 526 U.S. at 552. In light of the potential correlation between race and political voting behavior, "[i]n some circumstances, incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness, in the drawing of bizarre district lines." *Bush*, 517 U.S. at 967 (plurality opinion). Because of the sensitive nature of the legislative districting process – a process reflecting fundamental choices about a sovereign State's political self-identity – and the difficulty of determining predominant motive when both political and racial factors are involved, federal courts are to be "extraordinarily cautious" in evaluating a claim that race and not incumbency protection predominately motivated a State legislature's drawing of district lines. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

The question here is whether this case is one in which the partisan balance achieved by incumbency protection explains District 12's lines "as well as, or better than race." *Bush*, 517 U.S. at 958 (O'Connor, J., concurring). The district court answered that question in the negative: because "political explanations . . . utterly failed to explain the composition of the district," J.S. 26a, race was the real, predominant motivation.

Id. at 25a. The court based that conclusion on three grounds, none of which withstands scrutiny.

First, just as it did in its prior opinion on summary judgment reversed by this Court in *Hunt v. Cromartie*, the court relied on voter *registration* data purportedly showing that majority Democratic precincts were excluded from District 12 to rebut the State's assertion that the district was drawn predominantly to protect incumbents and preserve the partisan balance in the State's congressional delegation. The court's reliance on such evidence is untenable. As even plaintiffs' own expert recognized, voter registration data is *not* a reliable indicator of actual voting performance in North Carolina, and for that reason the legislature did not use it to draw district lines. The court's persistence in using a criterion the State disavowed, while ignoring the criterion on which it relied – partisan voting results – was clearly improper, and contravenes the analyses performed throughout the Court's equal protection jurisprudence.

Second, the court credited plaintiffs' expert's statistical analysis, which showed that predominantly African-American precincts were always included in District 12, while white, Democratic precincts were not. But such facts cannot properly be used to establish a predominant racial motive when the undisputed record *also* shows that the precincts that were included not only are Democratic but are *more reliably* Democratic than their contiguous white counterparts outside of the district. Since the selection of these precincts is fully consistent with the legislature's partisan political goals, their inclusion in District 12 cannot *disprove* the State's nonracial explanation for the district's design.

The court also found significant the claim of plaintiffs' expert that if incumbency protection were the true predominant motive for District 12's design, the State could have – and therefore would have – drawn a different, more compact district with more white precincts in the Piedmont Crescent.

But the few alternatives plaintiffs' expert offered up, which would have entailed splitting a county three ways or disrupting the home bases of sitting incumbents, simply were not practicable. Absent any evidence that the legislature ignored viable alternatives, with less racial impact, the court's inference that District 12's design was motivated predominantly by race was completely unreasonable.

Third, and finally, the court pointed to isolated statements from lawmakers that, it said, supported its conclusion that the legislature's motivations in drawing District 12 were primarily racial. But whether viewed alone or together, these evidentiary strands showed, *at most*, that legislators considered race in redistricting. The *consideration* of race, however, is not impermissible, and certainly is not synonymous with the *predominant* use of race. The court's conflation of these principles was improper.

The frailty of the evidence of racial predominance is even more apparent when one compares the record in this case with that proffered in previous redistricting cases in which this Court has found unconstitutional racial gerrymandering. Unlike in those other cases, there was no evidence here that the State adopted its redistricting plan under federal pressure to create majority-minority districts. Nor were there any concessions from lawmakers that they sought to maximize African-American voting strength. The record also was bereft of any proof that the district's shape was directly tied to efforts to increase minority-voting power or that districts were designed based solely on block-by-block racial data. In short, this evidentiary record nowhere approaches the level of proof of racial predominance found in previous redistricting cases. If anything, the record shows just the opposite – that lawmakers were motivated principally by the nonracial goals of complying with this Court's precedents, protecting incumbents, and preserving the State's partisan congressional balance.

Dramatic improvements to the district's shape also are

probative of the State's efforts to cure its prior constitutional violation and design districts based mainly on race-neutral goals. The district contains less than 70% of its original population and less than one-half of its original geographic area; its length was reduced nearly in half, making it the third shortest district in North Carolina; it splits only one precinct, for partisan reasons, and uses no artificial means of maintaining contiguity. Indeed, to the extent possible, given the difficult task of creating a Democratic district in the predominantly Republican Piedmont Crescent, the legislature followed traditional redistricting criteria. The resulting district, linking the strongly Democratic urban areas of Charlotte, Winston-Salem and Greensboro, is a perfectly sensible way of bringing reliable Democrats in that area together.

The facts in this case, in short, do not permit the inference that plaintiffs satisfied their burden of showing that the State's predominant nonracial explanation for District 12's design was pretextual, and that the primary motivation was racial. The court's error has implications far beyond this case. If the decision below is permitted to stand, legislators either will be reluctant to give *any* consideration to racial factors for fear that such consideration will constitute racial predominance or they will feel compelled to make race-*conscious* decisions to ensure that districts have sufficient concentrations of white voters to overcome a *Shaw* claim. Neither option is desirable or consistent with equal protection law.

There is another reason to set aside the decision below. The challenge to District 12 in this case is barred by the rules of claim preclusion. In the remedial phase of the earlier *Shaw* litigation, the district court explicitly ruled that the 1997 Plan conformed with constitutional requirements and that it was an adequate remedy for the constitutional defects in the prior plan. Following that ruling, the plaintiffs in the *Shaw* litigation immediately filed an amended complaint in this separate lawsuit - in front of a separate panel - alleging for the first time

in this case that District 12 violated the Constitution. While the two District 12 plaintiffs in this case – the only plaintiffs who actually have standing – were not actually plaintiffs in the *Shaw* litigation, those two also were "virtually represented" by the plaintiffs in the *Shaw* litigation under recognized claim preclusion rules. They are therefore bound by the *Shaw* judgment upholding the constitutional validity of District 12. On this ground as well, the decision should be overturned.

This case, in sum, presents two fundamentally different pictures of the legislature's motivations in enacting the 1997 Plan. One portrait is predominantly political, the other, primarily racial. That the court chose the latter over the former greatly misapprehends this Court's precedents and the seriousness of the burden plaintiffs must meet to prove racial predominance in redistricting. Unless that high bar is reestablished through reversal of the decision, the protections accorded inherently political legislative decision-making will be severely undermined, and redistricting plans that, like North Carolina's, do not convey the message that "political identity is, or should be, predominantly racial," *Bush*, 517 U.S. at 980 (plurality opinion), will be improperly invalidated. This Court should not countenance either result.

I. CAREFUL SCRUTINY OF THE DECISION BELOW IS REQUIRED TO DETERMINE WHETHER PLAINTIFFS HAVE MET THEIR STRINGENT EVIDENTIARY BURDEN FOR PROVING A PREDOMINANT RACIAL MOTIVE.

A. Plaintiffs Must Proffer Compelling Evidence That Race Was The Dominant Factor In The District's Design.

The plaintiffs' burden in any race-based Equal Protection Clause challenge is to establish that the State acted with a racially discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 240 (1976). Mere proof that a State was conscious of

racial factors or that its actions had a racially discriminatory impact is insufficient; the plaintiffs must establish that the State acted "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

In cases involving allegations of intentional race discrimination, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from," the party seeking to prove the unlawful discrimination. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). Thus, when the State defendant proffers a legitimate, nondiscriminatory explanation for an action that appears to have a discriminatory impact, the burden cannot shift to the State to prove that the asserted rationale was the real reason; rather, the plaintiff bears the burden of proving that the State's asserted reason was untrue, *i.e.*, a mere "pretext" for the real, discriminatory motive. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason [is] false, and that discrimination [is] the real reason.").

The plaintiffs' burden is even more difficult in redistricting challenges of the type recognized in *Shaw v. Reno*, 509 U.S. 630 (1993). Plaintiffs may not establish an equal protection violation simply by showing the presence of a racial motivation, but rather, must demonstrate that: (1) the state *substantially* disregarded traditional districting criteria in drawing district lines, *and* (2) that it did so *predominantly* because of racial considerations. *See Bush*, 517 U.S. at 958-59, 962-63 (plurality opinion); *id.* at 993-94 (O'Connor, J., concurring). *See City of Mobile v. Bolden*, 446 U.S. 55, 63 (1980) ("The Court made clear that in the absence of such an invidious purpose [racial classification], a State is constitutionally free to redraw political boundaries in any manner it chooses."). This standard means that plaintiffs cannot merely show that race is a credible explanation for the

challenged district's design. Rather, they must affirmatively demonstrate that the *nonracial* explanation offered by the State is *not* its predominant motivation but rather is a mere "pretext" for the predominant racial motive.

In this case, the State avers that the legislature was motivated not primarily by race in the enactment of its redistricting plan, but rather by a predominant desire to maintain a six-six partisan balance in the State's congressional delegation by designing the districts so as to protect incumbents. It is not disputed that race and political voting behavior correlate tightly in North Carolina – the undisputed evidence showed that African-Americans vote 95-97% Democratic.[20] It also is not disputed that, because of that correlation, the lines drawn to create District 12 *could* be explained by race: the most heavily Democratic precincts in the Piedmont Crescent where District 12 is located also are urban precincts whose residents and voters are, by and large, African-American. But the district's shape also derives from a legitimate nonracial goal: protection of incumbents. That goal is legitimate, irrespective of its effect on a district's shape or demographics:

> If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify, just as racial disproportions in the level of prosecutions for a particular crime may be unobjectionable if they merely reflect racial disproportions in the commission of that crime.

Bush, 517 U.S. at 968 (opinion of O'Connor, J.); *see Cromartie*, 526 U.S. at 551 ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State

[20] J.A. 139, 213, 589, 603.

were *conscious* of that fact.").

Thus, when race and political voting behavior are closely correlated, it is simply not enough for plaintiffs to establish that race is a possible, good, or even very good, explanation for a district's lines. *See Bush*, 517 U.S. at 968 (opinion of O'Connor, J); *Miller*, 515 U.S. at 916; *Shaw*, 509 U.S. at 646. Plaintiffs must affirmatively demonstrate that the state's asserted rationale of incumbency protection is *not* the predominant motivation for the district's design. Unless they do so, they have not carried their burden of establishing racial predominance. *See Miller*, 515 U.S. at 916. The central issue in this case, then, is whether plaintiffs have proven anything beyond what they showed at summary judgment: that legislators considered race along with a variety of other factors in redistricting, and that the district's borders correlate with race. A careful review of the evidence and the opinion below, as required by this Court, demonstrates that they have not.

B. A Rigorous Review Of The Record And Decision Below Is Required.

This Court has made clear that in redistricting cases, it will rigorously examine the evidence and the lower court's findings of fact and conclusions of law to determine whether a predominant racial motive has been conclusively shown. *See Bush*, 517 U.S. at 959 (plurality opinion). That is because "[t]he distinction between being aware of racial considerations and being motivated by them" and "the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires" an "extraordinarily cautious" review of a claim that a State has "drawn district lines on the basis of race." *Miller*, 515 U.S. at 916. *Cf. Jefferson v. Hackney*, 406 U.S. 535, 551 (1972) (expressing reluctance to "second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients").

Such rigorous review is particularly warranted in "mixed motives" cases in which the State testifies that legitimate districting considerations – such as a desire to protect incumbents and to produce a certain partisan balance in the delegation – played predominant roles but also concedes that race also was a factor in redistricting. *See Bush*, 517 U.S. at 959 (plurality opinion). In such circumstances, a "careful review" of the legislative process is necessary to determine whether race or politics was the predominant factor in the district's design. *Id.*

Careful review of the record ensures that *only* redistricting plans that engender the constitutional harms said to be caused by a predominantly race-based plan are invalidated. Because only the excessive focus on race "convey[s] the message that political identity is, or should be, predominantly racial," *Id.* at 980 (plurality opinion), and that elected officials' primary obligation "is to represent only the members of [their] group, rather than their constituency as a whole," *Shaw*, 509 U.S. at 648, redistricting plans that are nonracial or that are clearly predominantly motivated by race-neutral factors do not carry racially stigmatizing messages. Careful scrutiny of the record and the lower court's decision is thus necessary to make certain that redistricting plans that do not cause expressive harms are not declared unlawful.

The Court has applied such careful scrutiny in other redistricting cases. For instance, in *Bush v. Vera*, Justice O'Connor, writing for the plurality, engaged in a detailed district-by-district evaluation of the evidence and the lower court's findings to evaluate whether the decision below had sufficient support to warrant affirmance. *See* 517 U.S. at 963-971. Justice O'Connor stated:

> [b]ecause it is clear that race was not the only factor that motivated the legislature to draw irregular district lines, we must scrutinize each challenged district to determine whether the District Court's conclusion that

> race predominated over legitimate districting considerations, including incumbency, can be sustained.

Id. at 965. *See also Voinovich v. Quilter*, 507 U.S. 146, 154-58 (1993) (invalidating judge's finding of fact and/or mixed findings of law and fact that a Section 2 Voting Rights Act violation occurred); *id.* at 158-60 (invalidating the district court's finding that the redistricting plan violated the Fifteenth Amendment because the apportionment board intentionally diluted minority voting strength for political reasons). The same kind of rigorous scrutiny the Court has applied in previous cases is warranted here. And that scrutiny leads to only one conclusion: the decision below is clearly erroneous[21] and requires reversal.

C. A Comparison Of The Evidence In This Case With That In Previous Cases Is Warranted.

Before turning to the court's opinion, it is useful to bear in mind the level of record evidence of predominant racial

[21] It is unclear whether a *de novo* or a clearly erroneous standard applies in this case. While the court purported to apply this Court's predominance test, its opinion reveals that it essentially treated evidence that the district's lines correlated with race and that race was *a* motivating factor as sufficient proof to invalidate District 12's design. This is an application of the wrong legal standard, warranting *de novo* review. Alternatively, if the court did, in fact, apply the predominance standard, its conclusion that race predominated District 12's design is clearly erroneous. *See Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (holding in a case alleging a violation of Section 2 of the Voting Rights Act that courts may correct a finding of fact that is "'predicated on a misunderstanding of the governing rule of law'"); *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (factual findings may be overturned if "the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed"); *Uno v. City of Holyoke*, 72 F.3d 973, 978 (1st Cir. 1995) (noting in a voting rights case that "[t]hough the clear error standard is formidable, it is not a juggernaut that crushes everything in its path"). Under either standard, the decision fails.

motivation present in the Court's previous cases. When viewed against this yardstick, it becomes even more apparent that the plaintiffs have failed to carry their evidentiary burden under the predominance test.

In *Miller*, *Bush* and *Shaw*, the record contained clear direct evidence of predominant racial intent by the Georgia, Texas and North Carolina legislatures, respectively. This compelling evidence consisted, in whole or in part, of the following: (1) letters from the Justice Department insisting that African-American voting power be maximized through the creation of majority-minority districts;[22] (2) refusals from the Justice Department to preclear the State's legislative plans as insufficiently empowering for black voters;[23] (3) admissions by the state defendants that the challenged districts were drawn precisely to maximize minority voting power and/or comply with the Voting Rights Act,[24] and (4) the use of census blocks

[22] *See Shaw II*, 517 U.S. at 902 (noting that the Justice Department insisted that two majority-minority districts be created and "opined that the State's reasons for not creating a second majority-minority district 'appeared to be pretextual'"); *id.* at 913; *Miller*, 515 U.S. at 917, 920.

[23] *See Shaw II, 517 U.S.* at 906, 913; *Shaw*, 509 U.S. at 685; *Miller*, 515 U.S. at 917, 919.

[24] *See Vera v. Richards*, 861 F. Supp. 1304, 1314-16 (S.D. Tex. 1994) (finding that the legislature created a number of "safe" black and Hispanic districts in order to address Voting Rights Act concerns and prepared a "Narrative of Voting Rights Act Considerations in Affected Districts"); *see also id.* at 1337 ("The defendants concede that Congressional Districts 18, 29, 30 were created for the purpose of enhancing the opportunity of minority voters to elect minority representatives to Congress."); *Bush*, 517 U.S. at 961 (plurality opinion) (State concedes "that the three districts at issue 'were created for the purpose of enhancing the opportunity of minority voters to elect minority representatives to Congress'"); *see id.* at 960-61 (noting race-based concessions in State's preclearance submission to the Justice Department); *Shaw II*, 517 U.S. at 906 (State concedes that the redistricting plan's "*overriding* purpose was to comply with the dictates of the Attorney General's . . . letter and to create two congressional districts with effective black voting majorities'"); *Miller*, 515 U.S. at 910 (defendants did not dispute the court's factual finding of predominant racial

to draw districts, which provide only total population and racial data.[25] The circumstantial evidence of the districts' bizarre shape was directly tied to admitted efforts to comply with efforts to maximize African-American voting power.[26]

While the Court has never required proof of all such factors to sustain a constitutional challenge, it certainly has never permitted a redistricting plan to be struck down when the record contains *none* of these factors. The omissions in the record are telling:

• The record does not have any letters from the Justice Department insisting that the State maximize African-American voting strength. To the contrary, the State communicated with the Government only *after* the plan's passage, and then only to inform it that it did not believe that any majority-minority district other than District 1 was justified. J.A. 385. *See also* J.A. 206-09, 597.

• The State never conceded that race predominated District 12's design or that it intended to make that district majority-minority. Quite the opposite, it pursued decidedly nonracial, political goals and significantly reduced District 12's African-American population to below 50 percent. *See supra* note 18.

---

motivation); *see id.* at 918 (conceding that "it is undisputed that Georgia's eleventh is the product of a desire by the General Assembly to create a majority black district").

[25] *See, e.g., Bush*, 517 U.S. at 961-62, 970 (plurality opinion) ("unprecedented" use of census block data "enabled districters to make more intricate refinements on the basis of race than on the basis of other demographic information"); *Johnson v. Miller*, 864 F. Supp. 1354, 1377-78 (S.D. Ga. 1994) (legislature engaged in a "block by block search for black voters to add to the [district]"), *aff'd*, 515 U.S. 900 (1995). *See also Silver v. Diaz*, 522 U.S. 801 (1997) (three judge court) (invalidating district that was at points "one-block long" and "curve[d] and weave[d] among streets blocks" to pick up minority voters).

[26] *See Shaw*, 509 U.S. at 685-86; *Shaw II*, 517 U.S. at 906; *Miller*, 515 U.S. at 917.

• The State drew districts based on precincts, which are much larger than census blocks, and include political data.[27]

• Since the record is devoid of evidence that lawmakers were pressured to, and pursued, a policy of maximizing African-American voting strength, there is no proof that the district's shape was tied directly to that policy.

In short, as a review of the record and the decision below reveals, there is simply no basis to support the court's conclusion that plaintiffs satisfied their difficult burden of proving that the district's lines were drawn predominantly on race and that traditional redistricting criteria were subordinated.

II. THE COURT IMPROPERLY CONCLUDED THAT RACE, NOT INCUMBENCY PROTECTON, WAS THE PREDOMINANT FACTOR IN THE DESIGN OF DISTRICT 12.

It is axiomatic that, in determining whether a constitutional violation has occurred, a court must start with the presumption that a state legislature has acted in good faith and for permissible motives. *See Mueller v. Allen*, 463 U.S. 388, 394 (1983). That presumption fully applies in redistricting cases. *See Miller*, 515 U.S. at 916 (applying "presumption of good faith that must be accorded [all] legislative enactments"). Indeed, it is particularly important in redistricting cases in light of the "complex interplay of forces that enter [into] a legislature's redistricting calculus" and the core sovereignty function the redistricting process represents. *Id.* at 915-16. Thus, "although race-based decision making is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed." *Id.* at 915 (citation omitted).

In this case, the district court, in fact, specifically found that the 1997 Plan was generally drawn to maintain the six-six

---

[27] J.A. 518-20, 585.

partisan balance in the State's congressional delegation, and, to that end, had two legitimate, nondiscriminatory goals: "(1) to avoid placing two incumbents in the same district and (2) to preserve the partisan core of the existing districts to the extent consistent with the goal of curing the defects in the old plan." J.S. 11a. The panel further acknowledged that "[t]he plan as enacted largely reflects these directives: incumbent Congressmen generally do not reside in the same district, and each district retains at least 60% of the population of the old district." *Id.* Finally the court recognized that District 12 is, in fact, "one of the six predominantly Democratic districts established by the 1997 Plan to maintain the 6-6 partisan division" in the congressional delegation. J.S. 11a-12a.

Yet, despite the court's recognition that the legislature was pursuing legitimate redistricting goals, it relied principally on three stands of evidence to rule that District 12 was not designed predominantly to further those goals. First, the court used registration data to support its conclusion that the district's design was based predominantly on racial factors. Second, relying on the testimony of the plaintiffs' expert, the Court concluded that racial statistics, and only racial statistics, could explain District 12's boundaries. According to the court, the "uncontroverted evidence" demonstrated that:

> The *only* clear thread woven throughout the districting process is that the border of the Twelfth district meanders to include nearly all of the precincts with African-American populations proportions of over forty percent which lie between Charlotte and Greensboro, inclusive.

J.S. 25a (emphasis added); *see id.* 26a ("political explanations utterly failed to explain the composition of the district").

Third, the court relied on a few isolated statements by defendants that, it said, evinced a racial motive. *Id.* 27a-28a. Whether standing alone or taken together, these evidentiary

strands are insufficient to refute the State's showing that partisan politics provided the predominant motivation for District 12's design.

A. The Court Erroneously Discredited The State's Motives Based On Registration Data Rejected By The Legislature.

Repeating an error it made on summary judgment, the court again used *registration* data to impugn the State's motives. This was plainly wrong.

The court relied on maps that showed Democratic registration percentages by precinct. Using this data, the court focused on a few precincts adjacent to District 12 with Democratic majority voter registration rates that were not included in the district. *See, e.g.*, J.S. 13a ("[A]round the Southwest edge of District 12 (in Mecklenburg County), the legislature included within the district's borders several precincts with racial compositions of 40 to 100 percent African-American, while excluding from the district voting precincts with less than 35 percent African-American population, but heavily Democratic voting *registrations*.") (emphasis added); *id.* at 13a-14a (citing precincts in Mecklenburg and Forsyth Counties adjacent to, but not included in District 12, with Democratic "registrations" the court considered significant).

Such "findings" are wholly irrelevant. It was undisputed at trial that voter registration is not a useful indicator of actual voting performance in North Carolina. Indeed, as plaintiffs' own expert acknowledged: "registration data is the *least reliable* data to use for purposes of talking about political performance." J.A. 118 (emphasis added); *see Cromartie*, 526 U.S. at 551 ("[Defendants' expert's] more complete analysis was significant because it showed that in North Carolina, party registration and party preference do not always correspond."). For that reason, the uncontroverted evidence established that

the State used actual partisan voting patterns, not registration data, to draw district lines. *See supra* note 7. The court's failure to evaluate the State's actions against the criterion it *used*, and its reliance on a criterion the State expressly did *not* use – to conclude that race predominated the district's design cannot withstand scrutiny.

The court's approach is fundamentally at odds with settled law. In evaluating whether a state's asserted justification for a particular action is pretextual, its asserted rationale has *always* been compared with the criterion it used to achieve its goals. *See, e.g., Davis,* 426 U.S. at 245-46 (comparing State's use of a written personnel test to hire police officers against State's asserted justification that the test was necessary to predict job performance); *see id.* at 267 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 433 (1975) ("We were unable 'to determine whether the criteria *actually* considered were sufficiently related to the [employer's] legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact.'") (emphasis in original); *Feeney*, 442 U.S. at 265, 275-80 (comparing hiring preference for veterans alleged to discriminatorily impact women against State's asserted goals). A predominant racial motive simply may not be derived by comparing the State's asserted rationales against a criterion it did not use.

Ironically, even if the legislature had used registration data, rather than voting patterns, to design District 12, the court's opinion still would be unfounded. The registration data demonstrates that, with only very rare exceptions, the precincts outside of District 12 consistently have Democratic registration below 60%, while the adjoining precincts inside the district consistently have much higher Democratic registration rates – ranging from 60% to over 90%.[28]

[28] Joint Exhibits 107-109 (filed with the Court). On the rare occasions when a precinct within the district is between 50% and 60% in Democratic registration, the Democratic registration for each such precinct consistently is higher than that for its adjoining "excluded" precinct. *See id. See also* App. Br. at 1-3 (maps based on Joint Exhibits 107-109 contrasting Democratic registration figures for precincts inside and outside of District 12).

B. The Court Unreasonably Inferred A Predominant Racial Motive From Expert Testimony That Did Not Refute The State's Showing That Partisanship Predominated The District's Design.

The court also based its racial predominance ruling on particular passages from the testimony of plaintiffs' expert, Dr. Ronald Weber, who – according to the court – "showed time and again how race trumped party affiliation in the construction of the 12th District and how political explanations utterly failed to explain the composition of the district." J.S. 26a. For the critical propositions that "race trumped party affiliation" and that incumbency protection "utterly failed" to explain the shape of the district, the court relied on six distinct passages from Weber's testimony: J.S. 26a (citing Trial Transcript ("Tr.") pages). Not *one* of those passages supports either proposition.

The cited testimony makes the following points:

(1) Tr. 162-63 (J.A. 90-91): District 12 was not designed principally to further a partisan political agenda because it is more Democratic than necessary to elect a Democratic incumbent. Had the legislature really wanted to protect incumbents, it would have taken some voters out of District 12 and placed them in adjacent District 8 to make it more Democratic.

(2) Tr. 204-05 (J.A. 105-07): The counties in District 12 are always divided along racial lines, while predominantly white Democratic precincts were excluded.[29]

[29] This testimony also suggests that a Democratic district could have been drawn using Mecklenburg County as the anchor. The feasibility of this idea is addressed below. *See infra* at 32-33.

(3) Tr. 221 (J.A. 111): Every African-American precinct that could have been assigned to District 12 was assigned, while adjacent districts retained their white Democratic precincts.[30]

(4) Tr. 251 (J.A. 131): When race and politics are disentangled, race predominated the district's design.

(5) Tr. 262 (J.A. 139-140): The assignment of precincts in District 12 is inconsistent with a political motivation because white Democratic precincts were excluded.

(6) Tr. 288 (J.A. 156): A Democratic district could be drawn without putting all of the African-American precincts in that district.

Because the sum total of Weber's testimony proves nothing more than a close correlation between race, voting patterns and District 12's borders, it "utterly failed" to establish that race predominated the district's lines.[31]

---

[30] Weber also suggests in this citation that Precinct 77 could have been swapped with "a precinct or two in Forsyth County and have the same partisan result." J.A. 111. This suggestion is discussed below. *See infra* at 30-33.

[31] Weber's testimony was questionable from the start. First, he *presumed* a predominant racial motive from the outset, without considering alternative theories. J.A. 136-37. *See also* J.A. 746. Second, Weber testified that he did not believe that legislative bodies should be entrusted to draw redistricting plans. J.A. 150-51. Finally, Weber erroneously assumed that the State's computer database only permitted legislature's to view and manipulate precincts based on racial factors:

> The computer screen used by the North Carolina Legislative GIS System displays racial breakdowns as the plan designer is working *and does not display political breakdowns*. . . . Assessment of the political character of a district is post-hoc and *cannot be done while precincts are being allocated to a district.*

J.A 302 (emphases added). Weber repeated this error at his deposition, just eight weeks before trial, and did not abandon it until his cross-examination. J.A. 138-39. His supposition was plainly wrong. *See* J.A. 519-20 (showing

First Record Citation

Weber's first assertion that the State's motives were predominantly race-based because the district was overly Democratic was predicated on his view that a 60 percent partisan majority is optimal. J.A. 91. But an examination of voting patterns in the elections the legislature used to draw district lines – elections tracked in the State's computer database and relied on by the plan's drafters – shows that District 12 was *three* percentage points above Weber's optimum figure,[32] and thus, hardly can be said to be overly packed with Democrats.[33] Moreover, *two Republican districts*, 6 and 10, also exceeded the 60-percent figure,[34] and thus, were "overly" Republican. If no impermissible motives are drawn from the creation of two "overly safe," J.A. 91, Republican districts, then no nefarious purpose can be derived from a similar allocation in a Democratic district.

---

the political data available to the legislators by precinct). This case is thus significantly different from previous cases in which only racially laden, census block data was available. *See supra* at 19-20.

[32] This figure is derived by averaging Democratic voting returns for the three elections the legislature used to draw district lines. *See* J.A. 80a. Weber's reliance on a single election, the 1990 Senate race, is misplaced because the legislature used all three elections in redistricting. J.S. 206a-207a. Using the Gantt-Helms race alone skews the results because Gantt was the Mayor of Charlotte in District 12, and thus drew higher than average Democratic returns. The State also considered the judges' race, not the Gantt-Helms race, the most reliable indicator of actual party preference because voters generally are unaware of individual candidates' qualities. However, even considering that race alone, Republican Districts 6 and 10 also *exceed* Weber's 60-percent optimum partisan range. J.S. 80a.

[33] Even Weber concedes that all politicians prefer their districts to be as safe as possible. Tr. 265 ("I never met a politician who would admit their district was too safe").

[34] J.A. 80a. This result is derived by averaging Republican voting returns in the three elections tracked in the legislature's database. *See supra* note 7.

Second, Third and Fifth Record Citations

The contention Weber makes in the second contention – that the counties included in District 12 follow racial lines – is really the same as the point made in the third and fifth citations: that District 12 always includes African-Americans, to the exclusion of available white Democrats. That observation provides crucial evidentiary support for the district court's finding of pretext:

> Dr. Weber showed that, without fail, Democratic districts adjacent to District 12 yielded their minority areas to that district, retaining white Democratic precincts. This testimony served to undermine Defendants' contention that race was merely a factor in creating the 1997 Plan's 12th District, and that a desire to place high-performance Democratic areas (which happen to contain minority populations) within Democratic districts could explain the construction of the 12th.

J.S. 26a-27a (citation omitted).

But that conclusion – and the testimony cited to support it – ignores a key, uncontroverted fact: all of the precincts inside District 12 had *higher* Democratic voting rates (and even higher registration rates) than their contiguous white counterparts outside the district.[35] Even Weber was forced to concede this point. J.A. 140 ("Q: Are the white precincts as heavily Democratic? A: No."). The conclusion that race predominated over partisan politics only could be established if it could be shown either that predominantly African-American precincts were included in the district, even though they were *not* reliably Democratic on election day (thus permitting a permissible racial inference to be drawn from the deviation

[35] J.S. 213a, 217a, 221a (maps comparing voting patterns of contiguous precincts inside and outside of District 12).

from the asserted political criterion) or that contiguous white precincts that were *equally loyal* or *more loyal* to the Democratic Party consistently were excluded from the district. Weber's evidence showed neither.[36]

Obviously the district's lines had to be drawn somewhere, and some Democratic-performing precincts would have to be left out. But since the precincts actually assigned to District 12 are the most heavily Democratic, the pattern is perfectly consistent with the State's partisan political explanation, and certainly does not establish pretext. And since African-Americans in the State vote 95-97% Democratic, *see supra* note 20, the fact that the more reliable Democratic precincts also are the most heavily African-American is not at all surprising. Nor is it probative of racial predominance that the divisions of the counties and towns between District 12 and the surrounding districts comport with race, since all the districts were drawn to further partisan political goals, and race and political loyalties in North Carolina are closely correlated.[37] Notably, the precincts and counties in the adjacent Republican districts evince the *same* correlation between race and voting patterns as those in District 12: they are nearly 90%

[36] As the state's expert, Dr. Peterson, concluded after comparing all of the contiguous precincts inside and outside of the district: "[I]n the great majority of instances, the boundary of the 12th District serves to fence in Democrats rather than to fence them out." J.S. 173a. The Court in *Cromartie* deemed Peterson's "more thorough" analysis as "significant because it showed that in North Carolina, party registration and party preference do not always correspond." 526 U.S. at 541. Weber and the district court majority, however, inexplicably dismissed Peterson's segment analysis as "unreliable" in part because he ignored the "core" of the district. Peterson's analysis, however, responded directly to the court's own analysis comparing precincts along the outside of the district boundary with those inside the boundary, except that Peterson looked at all of the precincts and political data, not just registration figures. J.S. 161a-167a, 178a-182a. Weber also compared selected precincts along the district's borders. *See, e.g.*, J.A. 104.

[37] *See* J.S. 189a-91a; J.A. 250-52. *See also* J.A. 564 & n.1.

Republican *and* white.[38] Yet, this nexus among white voters, which bolsters the State's position that the district's lines were the product of a preexisting correlation between race and politics, was left unaddressed.

At bottom, these three record citations do nothing more than demonstrate a correlation between race and District 12's borders. Such a correlation is hardly sufficient to prove that race was the "dominant and controlling" consideration in the district's design and that traditional redistricting criteria were subordinated. *Shaw II*, 517 U.S. at 905; *Miller*, 515 U.S. at 913. Ironically, given the absence of viable Democratic alternatives, the only reason for a legislature seeking to shore up a Democratic district to do what Weber and the court suggest – prefer less reliable districts over more reliable ones – would have been to "whiten up" the district – a constitutionally impermissible goal.

Fourth Record Citation

Because Weber's testimony fails to establish racial predominance, his conclusion at the end of his direct testimony, that race predominated District 12's design, is of no moment. J.A. 131. Since Weber's testimony fails to prove predominance, then his conclusion based on that testimony likewise is of little value.

Sixth Record Citation

Weber's claim that the legislature's political explanation is belied by the availability of an alternative Democratic district that would not need to include as many African-American precincts is completely unfounded. Although the court gave this claim particular significance, *see* J.S. 26a, the record is devoid of any realistic alternatives.[39] Nowhere does Weber

[38] J.S. 77a-79a.

[39] Even if the district could have been designed differently, that would not, in and of itself, establish invidious discrimination. The decision to prefer one design to another is purely the province of the legislature, and the constitutionality of a state's redistricting plan should not depend on the individual preferences of statistical experts or federal courts. *See Miller*, 515 U.S. at 915; *Growe v. Emison*, 507 U.S. 25, 34 (1993); *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

even demonstrate that his so-called alternatives would significantly improve the district's shape.[40]

Weber's first attempt at crafting an alternative is to point out that Precinct 77, which was split in the 1997 Plan, could have been moved entirely out of District 12 and into District 9. J.A. 110-11. Not only is Precinct 77 in Mecklenburg County, the home base of the Democratic incumbent, but the district to which Weber seeks to assign it, District 9, is represented by Republican incumbent Sue Myrick. Shifting these Democratic voters into a predominantly Republican district would have wasted their votes, and made both districts less safe for their incumbents – the precisely opposite goal of the legislature. Moreover, it is simply impossible to see how Weber's testimony about Precinct 77 supports the conclusion that a more compact district could have been created. Not even Weber claims that moving this single precinct out, and adding others in, would have made the district more compact.

Weber's second attempt is to claim that some of District 12's predominantly African-American precincts could have been placed in adjacent District 8. But this proposal is

[40] Assuming *arguendo* that Weber had been able to identify a few precincts that actually could have been moved out of District 12 and into District 8 to make the latter more safe, that hypothetical possibility could hardly be probative of a predominantly racially discriminatory motive given the almost unimaginable complexity of the districting process. To infer that race and not incumbency protection was the State's predominant motive on the basis of slender deviations from an asserted hypothetical norm would contravene the Court's admonition that courts respect legislative prerogatives and exercise "extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916.

unworkable. Moving District 12's precincts in Mecklenburg County into District 8 would have split the county three ways between three incumbents – Sue Myrick, Mel Watt, and Bill Hefner. This approach would have disrupted the political bases of two incumbents who both live in Mecklenburg's County's main city, Charlotte. Moreover, as even Weber concedes, a three-way split would have contravened the legislature's goal of not dividing any county into more than two parts,[41] and also would have been likely to raise the suspicion of a federal court for failing to respect traditional redistricting criteria.[42]

Weber also suggested the possibility of using essentially all of Mecklenburg County as the anchor for a Democratic district in the Piedmont Crescent. J.A. 133. The district court did not cite or rely on that suggestion, and it is easy to see why. For the reasons just discussed, Mecklenburg County *had* to be split between a Republican and a Democratic district, because both Democratic and Republican incumbents live in the county seat of Charlotte.[43] Moreover, as even Weber concedes, a

[41] J.A. 179, 754.

[42] Though Weber did not offer any other possibilities for swapping some of District 12's precincts with those in District 8, it bears mention that, as a map of the 1997 Plan shows, *see* J.A. 501, District 8 also could not have expanded further north to reach the Democratic precincts in Rowan County because those precincts are blocked by a large Republican buffer of Republican precincts. Legislators would thus have been forced to include too many Republican precincts in Rowan County before reaching the Democratic precincts in that county, undermining District 8's Democratic base and diluting adjacent District 6's Republican base. District 8 also could not have gone northwest into Iredell County because that would have split District 12 in half, or divided Iredell County between three districts and significantly reduced District 12's width.

[43] Even if such a unified county had been politically feasible, neither Weber nor the court explains how the rest of a Twelfth Democratic district centered around Mecklenburg County could have been drawn, and no realistic options are apparent. For instance, Mecklenburg could not have been joined to neighboring Cabarrus County since Cabarrus was Hefner's

Mecklenburg district would have been only "marginally Democratic," *id.*, and thus, would not have served the State's goal of making a sufficiently safe district to protect the incumbent.[44]

***

In sum, the district court's conclusion that Weber's statistical analysis "showed time and again . . . how political considerations utterly failed to explain the composition of the district," J.S. 26a, was clear error. A predominant racial motive simply cannot properly be inferred from evidence establishing that African-American majority precincts are consistently assigned to District 12 when the undisputed evidence *also* shows that those selfsame precincts are not only reliably Democratic but *more* reliably so than their predominantly white, Democratic counterparts.

It also was unreasonable for the court to infer a predominant race-based motive from Weber's claim that District 12 is too Democratic to be explained by incumbency protection, and that a different district would have been drawn if that had been the State's true predominant goal. Those inferences ignore the existence of Republican districts above

home base, and he insisted that his entire county remain in District 8. J.S. 208a; J.A. 205-06, 661-62, 781-82.

[44] In a colloquy during trial, Judge Boyle noted that District 12 in the 1998 Plan was more compact and that the Democratic incumbent prevailed in the 1998 election under that plan. J.A. 204-05. The district court's opinion, however, did not cite or rely on the 1998 Plan as evidence that the State could, hypothetically, have drawn a more compact, sufficiently Democratic district and thus must not have been motivated by partisan considerations. In any event, it is not disputed that the 1998 Plan is much *less* Democratic and, thus, affords a sitting incumbent much less protection than the 1997 Plan. The 1998 Plan eliminated all of Guilford County from District 12, and assigned it, along with loyal Democratic voters, to overwhelmingly Republican Districts 5 and 6, effectively nullifying their votes. *See, e.g.*, J.A. 192-94, 625.

Weber's optimal party level, as well as the undisputed political and geographic constraints on the districting process. Perhaps most devastating is the complete absence of any viable alternatives for a Democratic district in the Piedmont Crescent. In short, nothing Weber offered even tended to show – much less conclusively prove – that incumbency protection did not explain District 12's lines "as well as, or better than, race." *Bush*, 517 U.S. at 968 (O'Connor, J., concurring).

Indeed, when the record evidence is viewed through the proper lens, a striking irony emerges from the decision below. The district court, not the State, seems predisposed to define voters in and out of District 12 based on their race. As noted above, the court's descriptions of the precincts and sections of cities and counties in District 12 are consistently put in racial terms, when in every single instance, the court could just as readily have substituted the phrase "loyal Democrat" for "African-American." And in focusing on the State's failure to prefer the "excluded" majority-white precincts over those actually most loyal to the Democratic party, the panel's opinion effectively suggests that the legislature *should* have been motivated by race – that it should have preferred the "whiter" but less Democratic surrounding precincts over the "blacker," but more Democratic included precincts. Surely *Shaw* claims were never intended to turn the central guarantee of equal protection – race neutrality – entirely on its head.

C. The District's Shape Was Not Probative Circumstantial Evidence Of Motive Because The Shape Was Justifiable On Both Racial And Political Grounds.

This Court consistently has held that the "bizarre" shape of a district "may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913. Relying on this principle, the district court focused on the "meander[ing]"

shape of the district and its evident diversions to "pick up" African American voters, J.S. 25a; *see id.* at 12a-17a, 26a. But the fact that the district's shape was *capable* of being explained by racial factors did not prove that race was the predominant factor. As Justice O'Connor stated in *Bush*: "In some circumstances, incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness in the drawing of bizarre district lines." 517 U.S. at 968.

Dramatic improvements in the district's shape, moreover, only bolstered the legislature's partisan non-racial explanation. At the outset, it bears mention that the legislature's legal obligation was to remedy the constitutional violations in its prior plan, not to begin completely anew in drawing its districts. In accomplishing that objective, the legislature did what other courts and legislative bodies in similar circumstances have been instructed to do: retain the core of the prior redistricting plan, while taking those steps necessary to cure the constitutional violation. *See, e.g., Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam); *Lawyer v. Dep't of Justice*, 521 U.S. 567, 574, 577-81 (1997).

Yet, despite the narrow scope of its constitutional obligation, the legislature made sweeping changes to District 12. As even the court below conceded, the new district eliminated nearly one-third of its population and three-fifths of the land from the prior 1992 design. The district also was shortened by 65 miles from its former length of 160 miles, making it the third shortest district in North Carolina. In addition, legislators widened the district and eliminated split precincts, point contiguity, cross-overs and other artificial means of maintaining contiguity. *See supra* note 9. As much as possible, the district followed natural boundaries such as city lines, main roads and transportation corridors. The district's African-American population was reduced from 56.63% to 46.67% and its African-American voting age population was

reduced from 53.34% to 43.36%. The precincts that were included in District 12 shared a community of interest emanating from their position as urban areas that ran along a major transportation corridor. *See supra* note 16.[45]

In the face of these dramatic changes and the legislature's adherence to traditional redistricting criteria, the court's dismissal of such changes as being of "limited value" and not "advanc[ing]" the State's argument that partisanship dominated the district's design, J.S. 24a, was erroneous. To be sure, District 12 is longer and thinner than the other districts. But that is explained by legitimate and unavoidable political and geographic factors. The goal of creating a Democratic district in the Piedmont Crescent could not be achieved by drawing a circle; the district had to be elongated because the main cities in this part of the State with significant Democratic populations – Charlotte, Greensboro and Winston-Salem – themselves stretch North and South along the Piedmont Crescent. The thinness of the district is attributable to the dense population in that area of the State; expanding the district's lines would have exceeded the population balance and swept in too many neighboring Republican precincts. The legislature also was constrained by the political reality that neither party intended to cede the major cities of Charlotte, Greensboro or Winston-Salem to the other.[46] Moreover, as indicated above, the legislature had to draw the district's boundaries in such a way as to preserve both the Democratic character of District 12 and the Republican character of neighboring districts 5, 6, 9, and 10. Thus, the court's conclusion that the district "winds" and

[45] In this respect, District 12 is similar in concept to Georgia's permissible remedial District 11, which uses the "connecting cable" of Interstate 85 to string together parts of 13 counties to form a district with a distinctive "urban/suburban flavor" and "a palpable community of interests." *Johnson v. Miller*, 922 F. Supp. 1556, 1564 (S.D. Ga. 1995), *aff'd sub nom., Abrams v. Johnson*, 521 U.S. 74 (1997).

[46] *See, e.g.*, J.S. 207a-09a.

weaves to "gobble in" African-American precincts, J.S. 24a-25a, simply ignores the fact that the district could just as readily be described as "wind[ing] and weaving to "gobble in" reliably loyal Democratic precincts in an area of the State that is surrounded by precincts that are predominantly Republican or only marginally Democratic.

The panel's dismissal of the improvements in the 1997 Plan, moreover, is inconsistent with the Court's treatment of changes to other remedial plans in prior cases. For instance, in *Lawyer*, the Court upheld a revised redistricting plan that retained a significant portion of the State's prior plan, even though the district was still irregular in shape and had a significant number of minority voters. 521 U.S. at 574, 577-81. Likewise, in *Wright v. Rockefeller*, 376 U.S. 52 (1964), the Court upheld a redistricting plan that contained four irregularly drawn districts because it recognized the geographic and demographic difficulties of designing districts in that area of the State. "Although the boundary lines were somewhat irregular, the majority reasoned, they *were not so bizarre as to permit of no other conclusion*." *Shaw*, 509 U.S. at 646 (discussing *Wright*) (emphasis added). The facts of this case compel the same conclusion.

D. The Panel's Reliance On Isolated Statements By Legislators That Establish, At Most, That Race Was Considered Does Not Establish That Race Predominated.

This Court has not hesitated to invalidate a lower court decision if the court draws an unreasonable and thus impermissible inference from the record. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984). Here, the lower court drew precisely such unreasonable inferences. The court took anecdotal evidence that legislators were aware of and had discussed race in designing District 12, and inferred a predominant racial motive. This inference was unreasonable in light of the record. *At most*, the evidence suggested that race

was *one* consideration among many in redistricting. Such evidence could thus not be used to establish that race was the "dominant and controlling" consideration, *Shaw II*, 517 U.S. at 905, in District 12's design, and that traditional redistricting criteria were subordinated. *See Miller*, 515 U.S. at 913.

As the uncontroverted evidence established, the goal of the legislature was to design districts that would maintain the partisan balance and protect incumbents. *See supra* note 6. Even the court conceded that these goals were faithfully pursued. *See* J.S. 11a (noting that the plan "reflects these directives"). Yet, from this comprehensive record of the legislative redistricting process, the district court plucked out three isolated statements from defendants, and erroneously construed them as supporting the predominant use of race.

The court first quotes a fragment of a statement by Senator Cooper on the floor of the Senate that the plan provides for a "racial and partisan balance" and uses that statement as evidence that the legislature intended to maintain the ten-two racial balance in the legislature. J.S. 27a. But this ignores the overwhelming thrust of Cooper's testimony: that the legislature sought to comply with the law by adhering principally to race-neutral principles, while ensuring that the redistricting plan was fair to minorities and gave them a "fair shot" at winning an election. J.A. 221-22 (quoting Cooper's testimony).

Moreover, the court omitted Cooper's reference to a "*geographical*" balance in the same phrase as "racial" and "partisan" balance. J.A. 221; *see also* J.A. 460 (Cooper noting that the overall the plan "provides for a fair geographic, racial and partisan balance throughout the State of North Carolina"). The reference to "racial" alongside "geographical" and "partisan" conveys, at most, that the legislature considered *each* of these factors in redistricting. It certainly does not demonstrate that race *trumped* political or geographical factors in the district's design. And since it cannot reasonably be

inferred that "geographical balance" means that the 1997 Plan allocated a specific number of districts based on geographic lines, there was no reason to assume – and plaintiffs did not conclusively demonstrate – that Cooper's reference to race had a numerical connotation.

The court's reliance on a second statement by Cooper during the Senate floor debate that strict scrutiny analysis may not be triggered because District 12 is not majority-minority was wholly beside the point. Cooper was merely reciting his understanding of the current state of equal protection law.[47]

Finally, the district court majority gave considerable weight to a hastily drafted e-mail to Cooper from Gerry Cohen, the legislature's computer technician. J.A. 369. The e-mail deals almost exclusively with details regarding shifts of precincts in District 1. Only the last line of the e-mail even purports to address District 12. The phrase that Cohen had "moved Greensboro Black community into the 12th and now need to take bout [*sic*] 60,000 out of 12th," *id.*, was merely a shorthand description for those sections of Greensboro that were added to the district – areas that were predominantly African-American *and* solidly Democratic. J.A. 629 (Cooper stating that he "already knew that the precincts that were in the predominantly black areas were heavily Democratic"). Surely an equal protection violation cannot turn on Cohen's failure to stick the word "Democratic" between "Greensboro" and "Black."[48]

---

[47] The Court recognized in *Lawyer* that "[t]he fact that [a challenged district] is not a majority-black district . . . supports" a decision not to subject that district to strict scrutiny. 521 U.S. at 581. In any event, Cooper's testimony that there was no motive within the legislature to keep the African-American percentage just below 50% is uncontradicted. J.A. 221.

[48] Obviously, in light of the extension of the district to Greensboro, other residents would have to be removed to maintain the population balance. Moreover, the e-mail was simply inaccurate: the changes to the plan referenced by the e-mail added 29 Guilford County precincts to District

Even putting these strands of evidence in their strongest light, these statements, at best, establish that racial considerations were *a* factor in Cooper's thinking – a fact the State readily admitted, J.A. 222, and this Court has found permissible. *See Bush*, 517 U.S. at 958-59 (plurality opinion); *see id.* at 993 (O'Connor, J., concurring). But it is unreasonable to infer racial predominance from these isolated fragments, which neither disprove the State's position that politics predominated the district's design nor establish that traditional redistricting criteria were subordinated. As Judge Thornburg aptly noted, these statements merely reinforce the fact that lawmakers "were conscious of race, aware of racial percentages, on notice of the potential constitutional implications of their actions, and generally very concerned with these and every other political and partisan consideration which affected whether or not the redistricting plan would pass." J.S. 47a-48a n.18.

This Court's holding in *Lynch v. Donnelly*, 465 U.S. 668 (1984), reviewing an Establishment Clause claim, is instructive. In reviewing a district court's determination that a city's inclusion of a crèche in a holiday display lacked a secular purpose, the Court held that the decision could not be sustained because the court drew the wrong inference from the evidence. *See id.* at 680 ("The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations."). [49] The same is true here: plaintiffs simply

12, of which 18 were majority white, and involved over 100,000 citizens, of whom about 50,000 were white. J.A. 264-65, 268.

[49] *See also Henry v. C.I.R.*, 170 F.3d 1217, 1233 (9th Cir. 1999) (Tax Court drew "speculative" inferences from the record); *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1248-49 (11th Cir. 1998) (If "there is [no] evidence to support an inference of a causal link between . . . discriminatory animus and the decision to terminate [the] employment" the court will

have not shown that there was "no question" that race predominated the design of District 12.

III. RECOGNIZED CLAIM PRECLUSION RULES BARRED PLAINTIFFS FROM CHALLENGING DISTRICT 12.

The district court erred in even entertaining plaintiffs' challenge to the constitutionality of District 12; this challenge plainly was barred by claim preclusion. On remand from this Court's decision in *Shaw II*, the district court explicitly approved the 1997 Plan's reformation of District 12 "as a constitutionally adequate remedy." J.S. 320a. The plaintiffs in that case did not appeal that ruling. Because the two *Cromartie* plaintiffs residing in District 12 were in privity with the *Shaw* plaintiffs through "virtual representation," they were bound by the *Shaw* decision, and the district court should have dismissed this complaint. The *Shaw* and *Cromartie* plaintiffs merely sought to shop for a more favorable panel and to manipulate the federal court system to render meaningless the adverse result upholding the 1997 Plan in *Shaw*. This Court should reverse the district court and render unsuccessful plaintiffs' tactical maneuvering, which, if condoned, would make federal district courts' review of states' districting decisions judgments without finality.

A. The District Court In Shaw Entered a Final Judgment Holding the Revised District 12 Constitutional.

After holding District 12 unconstitutional in *Shaw II*, this Court remanded the case to the district court for an appropriate remedy. The *Shaw* plaintiffs then amended their complaint and added as plaintiffs Martin Cromartie, Thomas Chandler Muse and Glennes Dodge Weeks, all residents of District 1. J.S.

"disregard the court's ultimate finding of intentional discrimination based on that inference as clearly erroneous.").

283a. That same day, these three plaintiffs filed this separate action, represented by the same attorney who represented them in *Shaw*. With the consent of plaintiffs, all proceedings in this action were stayed pending completion of the *Shaw* litigation.

The General Assembly enacted the 1997 Plan and submitted it to the *Shaw* district court for approval. That court allowed Cromartie, Muse, and the other *Shaw* plaintiffs to raise constitutional challenges to the plan,[50] but they did not make use of that opportunity. Instead, seeking to present their challenge to a panel that they perceived as more favorable, the plaintiffs asked the court to "not approve or otherwise rule on the validity" of the new plan, and to "dismiss this action without prejudice to the right of any person having standing to maintain a separate action attacking [its] constitutionality." J.S. 308a. The state defendants opposed this effort to preserve the challenges to the 1997 Plan and to present them in this lawsuit.

Rejecting the plaintiffs' request that it decline to rule on the merits of District 12, the district court in *Shaw* ordered the 1997 Plan "APPROVED as having adequately remedied the specific constitutional violation respecting former congressional District 12." J.S. 312a. Plaintiffs filed no appeal from that order or the identically worded judgment filed three days later. *Shaw v. Hunt*, 92-202-CIV-5-BR, Judgment (E.D.N.C. September 15, 1997).

One month later, the district court dissolved the stay order in this case. On that same date, plaintiffs filed an amended complaint claiming that Districts 1 and 12 in the 1997 Plan, just approved by the district court in *Shaw*, were unconstitutional. The defendants argued that, under basic principles of claim

[50] The district court directed them to advise the court "whether they intend[ed] to claim that the [new] plan should not be approved by the court because it does not cure the constitutional defects in the former plan." *Shaw v. Hunt*, CA No. 92-202-CIV-5-BR, Order (E.D.N.C. June 9, 1997).

preclusion, the *Shaw* ruling barred the challenge. The district court rejected this argument, stating summarily that the "decision of the Shaw three-judge panel was not preclusive of the instant cause of action, as the panel was not presented with a continuing challenge to the redistricting plan." J.S. 2a-3a.

B. The Doctrine of Claim Preclusion Barred Plaintiffs' Successive Challenge to District 12.

Under the doctrine of claim preclusion, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981). *See also Allen v. McCurry*, 449 U.S. 90, 94 (1980) (both claim preclusion and issue preclusion "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication"); *Comm'r of Internal Rev. v. Sunnen*, 333 U.S. 591, 597 (1948) (citation omitted) (claim preclusion "rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations").

Plaintiffs' claim was thus barred because the validity of District 12, first in the 1992 Plan and then in the 1997 Plan, was the heart of the *Shaw* case previously litigated to judgment. The court below rejected the claim preclusion argument on the theory that the *Shaw* court "was not presented with a continuing challenge to the redistricting plan." J.S. 2a-3a. Presumably, it did so because the *Shaw* plaintiffs sought to avoid an unfavorable ruling by requesting that the *Shaw* court not rule on the validity of the 1997 Plan at all. J.S. 308a. But claim preclusion prevents relitigation not only of issues actually litigated in a prior action, but also of issues that could have been litigated by the plaintiffs. *See Federated Dep't Stores*, 452 U.S. at 398; 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §§ 4406, 4407 (2d ed. 1987) ("Wright & Miller").

The *Shaw* court rightly concluded that it was obliged to rule on the validity of the 1997 Plan's District 12, since it had been offered as a remedy for the constitutionally defective 1992 Plan. J.S. 319a. It therefore ruled explicitly that the 1997 Plan "adequately remedied the specific constitutional violation respecting former congressional District 12" identified in *Shaw II*. J.S. 312a. Though the court below may have disagreed with the judgment entered by the court in *Shaw*, that judgment had preclusive effect. *See Federated Dep't Stores*, 452 U.S. at 398 (*res judicata* not affected "by the fact that the judgment may have been wrong" or by "erroneous conclusion" of court in first case). Under the doctrine of claim preclusion, the final judgment in *Shaw* extinguished any claim that the *Shaw* plaintiffs and their privies had to litigate the validity of District 12.

Only two plaintiffs, J. H. Froelich, Jr. and R. O. Everett, were residents of District 12 with standing to challenge that district.[51] Although neither was a plaintiff in *Shaw*, both are bound by the *Shaw* judgment. Their close associations with lead counsel Robinson Everett, their awareness of the case and consultation with counsel, and the tactical maneuvering that brought them into this litigation as part of an effort to avoid the adverse *Shaw* decision, all bring them into privity with the *Shaw* plaintiffs through the rule of "virtual representation." *See* 18 Wright & Miller, *supra*, § 4457.

As this Court has noted, "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). The general rule that a person must have been a party to a prior

[51] Plaintiff Ronald Linville also tried to challenge revised District 12, but he is not a resident of the district. J.S. 341a. Although the majority of the district court treated the issue as moot, *see* J.S. 30a n.10, the reasons Linville should have been dismissed were fully discussed by Judge Thornburg in his dissenting and concurring opinion. *See* J.S. 64a-67a.

proceeding to be bound by it has a recognized exception "when . . . a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." *Id.* (citation omitted). Lower federal courts have frequently recognized that, under appropriate circumstances, a person whose interests are adequately represented may be deemed to be privity with prior litigants through "virtual representation," especially in cases involving broad issues of public law, rather than more individualized grievances. *See, e.g., NAACP, Minneapolis Branch v. Metro. Council*, 125 F.3d 1171 (8th Cir. 1997) (prior class action challenging segregated housing and related educational deficiencies bars subsequent action by school children who were not members of initial class), *cert. denied*, 525 U.S. 826 (1998); *Tyus v. Schoemehl*, 93 F.3d 449, 456 (8th Cir. 1996) (action challenging city alderman districts on constitutional and Voting Rights Act grounds barred by prior suit for plaintiffs who participated in prior suit and others allied with them); *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990) (action by state legislators challenging flying of confederate flag barred by prior judgment against different legislator raising similar claims); *Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (plaintiff parents and their children precluded from pursuing first amendment claims against school system and state officials because of participation by father and some of the children in similar prior suit); *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 750 F.2d 731, 741 (9th Cir. 1984) (entire class of black schoolchildren barred from litigating segregation claims identical to those in prior class action on grounds that overlapping plaintiffs in prior suit adequately represented current class, including children who were not members of initial class); *Petit v. City of Chicago*, 766 F. Supp. 607, 613 (N.D. Ill. 1991) (white police officers bound by prior suit brought by Department of Justice and intervening police officers challenging promotional examinations).

Privity through virtual representation applies when parties to the earlier suit – in this case, counsel Robinson Everett and

his co-plaintiffs in *Shaw* – are so closely aligned with the interests of the present parties as to be their virtual representatives. *Tyus*, 93 F.3d at 454. A necessary condition for preclusion by virtual representation is that there be an identity of interests such that the original litigants adequately represented the interests, or had the same incentive to pursue the interests, of the current plaintiffs. *See NAACP, Minneapolis Branch*, 125 F.3d at 1174; *Petit*, 766 F. Supp. at 611; *Los Angeles Branch NAACP*, 750 F.2d at 742-46. Here, lead counsel Robinson Everett, who was both a plaintiff and lead counsel in *Shaw*, had the same incentive to litigate the validity of District 12 in *Shaw* that he has pursued in this case as counsel through plaintiffs Froelich and Everett, his first cousin. Before the remedial proceedings in 1997, Everett had already devoted five years of litigation to the cause of having District 12 deemed invalid; immediately after the remedial proceedings, he filed this suit to try his case again. There is no reason why the same interests and incentives would not have guided his strategy in the remedial proceedings themselves.

When the necessary identity of interests exists, courts applying claim preclusion through virtual representation consider additional factors, including "'participation in the first litigation, apparent consent to be bound, apparent tactical maneuvering, [and] close relationships between the parties and nonparties.'" *Jaffree*, 837 F.2d at 1467 (quoting 18 Wright & Miller, *supra*, § 4457 at 494-99). Those factors favor a finding of virtual representation in this case.

Plaintiff Everett knew his cousin was litigating *Shaw* and joined the suit when his cousin "said that he needed to start over." "He called me and said he needed a plaintiff in Rowan County." J.S. 331a-34a. Plaintiff Froelich had been in business with both attorney Everett and his mother. Froelich knew about *Shaw* while it was pending, discussed it with his old friend, told Everett he was willing to be a plaintiff, and even filed a declaration in *Shaw*. J.S. 335a-37a; J.A. 672-678. Thus, these

plaintiffs were fully on notice of *Shaw*, followed it throughout, communicated with *Shaw* counsel, and became parties only when counsel decided he needed new plaintiffs.[52]

Especially important to this analysis is the tactical maneuvering of the *Cromartie-Shaw* plaintiffs in their efforts to rejuvenate their challenge to the congressional districting plan. Significantly, Cromartie and Muse also were plaintiffs in *Shaw* while it was on remand from this Court's decision in *Shaw II*. They were thus among the *Shaw* plaintiffs who urged the district court not to rule on the merits of the 1997 Plan, apparently for the sole purpose of pursuing the case in a different forum in hope of a more favorable result.

These close affiliations and overlapping of plaintiffs and counsel along with the tactical maneuvering require the application of claim preclusion.[53] Otherwise, "it would allow various members of a coordinated group to bring separate lawsuits in the hope that one member of the group would eventually be successful, benefiting the entire group." *Tyus*, 93 F.3d at 457. *See also Petit*, 766 F. Supp. at 612-13; *Louisiana*

---

[52] In *Richards*, the Court relied on the *absence* of these same factors to hold that nonparties to an initial suit were not precluded by the judgment in that case. *See* 517 U.S. at 802 (parties to two cases described as "mere strangers" to one another); *id.* at 805 (plaintiffs "received neither notice of, nor sufficient representation in," the prior litigation). Decided on these very different facts, *Richards* is not in any way inconsistent with application of the "virtual representation" doctrine in this case.

[53] The mere fact that the same counsel represented the *Shaw* plaintiffs and represents the *Cromartie* plaintiffs is not, of course, controlling. *See S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999). However, it is one thing for successive plaintiffs not claimed to be in privity to hire the same attorney in a matter in which he is experienced. It is a different matter altogether for the same attorney to be counsel to successive plaintiffs when the attorney also was a plaintiff in the first suit and solicits his cousin and business associate as plaintiffs in the second suit and when that attorney engages in tactical maneuvering to try to renew the case in a more promising posture. *See Tyus*, 93 F.3d at 459 (Henley, J., concurring).

Seafood Mgmt. v. Foster, 53 F. Supp. 2d 872, 884 (E.D. La. 1999). If claim preclusion does not apply in a case like this, then attorney Everett or any similarly invested attorney will be able to bring the same suit over and over, recruiting new plaintiffs, until he prevails. Interested persons like plaintiffs Everett and Froelich will be able to await the results of the first, second, or even third case and then pursue the same claim again.

Redistricting challenges are the type of public law claims that are particularly appropriate for claim preclusion based on privity through virtual representation. In this case, plaintiffs Froelich and Everett have not claimed they were denied the right to cast their individual votes. *See Tyus*, 93 F.3d at 457. Instead, they asserted they had been harmed as a result of their residence in the congressional district, a harm shared under this Court's decisions with more than 550,000 other persons.[54] *See United States v. Hays*, 515 U.S. 737, 745 (1995); *see also Shaw II*, 517 U.S. at 904. If claim preclusion does not apply in a case like this, then plaintiffs in later suits may sit back and await the judgment in the first case, knowing they will benefit from a favorable judgment and having no incentive to intervene. *See Petit*, 766 F. Supp. at 613; *Tyus*, 93 F.3d at 456. To allow such successive suits would "discourage the principles and policies the doctrine of res judicata was designed to promote" – the principles of finality of litigation and limiting persons to a single "bite at the apple." *See Petit*, 766 F. Supp. at 613.

Because plaintiffs "raise an issue of public law" that otherwise would encourage "fence-sitting," this is precisely the type of case for which claim preclusion by virtual representation is appropriate and, indeed, essential. *See Tyus*, 93 F.3d at 457 (applying claim preclusion through virtual

[54] This Court noted a similar distinction for claim preclusion purposes between the type of private taxpayer suit it addressed in *Richards* and more generalized taxpayer actions for which claim preclusion would be more freely available. *Richards*, 517 U.S. at 803.

representation to vote dilution claims under Section 2 of the Voting Rights Act of 1965 and the United States Constitution). Thus, school desegregation claims by school children not part of the plaintiff class in a prior lawsuit were barred in part because, absent privity through virtual representation, "those claims would assume immortality." *Los Angeles Branch NAACP*, 750 F.2d at 741. Particularly in public law suits such as this, where the harms are more generalized and the potential plaintiffs number in the hundreds of thousands, groups of affiliated persons should not be allowed to bring successive lawsuits free of claim preclusion restrictions. The district court's failure to recognize that claim preclusion barred plaintiffs' District 12 challenge led to the court's unwarranted intrusion into the State of North Carolina's sovereign responsibility to determine its congressional districts and disrupted the electoral process repeatedly and unnecessarily. The district court's decision requires reversal.[55]

[55] As a remedy for its conclusion that the 1997 Plan is unconstitutional, the district court ordered that the State adopt a new districting plan in time for the imminent 2000 election. This Court stayed that order, and it is now likely that the 2000 election will have been held before this Court issues its decision in this case. If the Court affirms the judgment below, the State respectfully requests that the Court vacate the district court's remedial order, and require only that the State adopt a new plan for the 2002 election. This Court has repeatedly allowed elections to proceed even under concededly invalid districting plans and required no new elections to be held when "equitable considerations" such as the disruption to the legislative process and the lack of ample time to enact a new plan require it. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). *See Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 655 (1964); *Roman v. Sincock*, 377 U.S. 695, 711-12 (1964); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 739 (1964). Anticipating that, if the judgment below is affirmed after the 2000 election has been conducted, the plaintiffs are likely to seek an order from the district court setting aside the results of that election and requiring an interim congressional election, the State asks that the Court make clear that any relief accorded the plaintiffs as a result of an affirmance does not include requiring the State to hold an interim election for members of Congress prior to the 2002 election.

CONCLUSION

For the reasons stated, this court should reverse the district court's ruling and remand for entry of judgment for the State. defendants.

Respectfully submitted,

MICHAEL F. EASLEY
North Carolina Attorney General

Tiare B. Smiley*
Special Deputy Attorney General

Norma S. Harrell
Special Deputy Attorney General

Walter E. Dellinger
O'Melveny & Myers LLP

Brian D. Boyle
O'Melveny & Myers LLP

Crystal Nix Hines
O'Melveny & Myers LLP

Jonathan D. Hacker
O'Melveny & Myers LLP

September 8, 2000

* Counsel of Record

INDEX OF APPENDICES

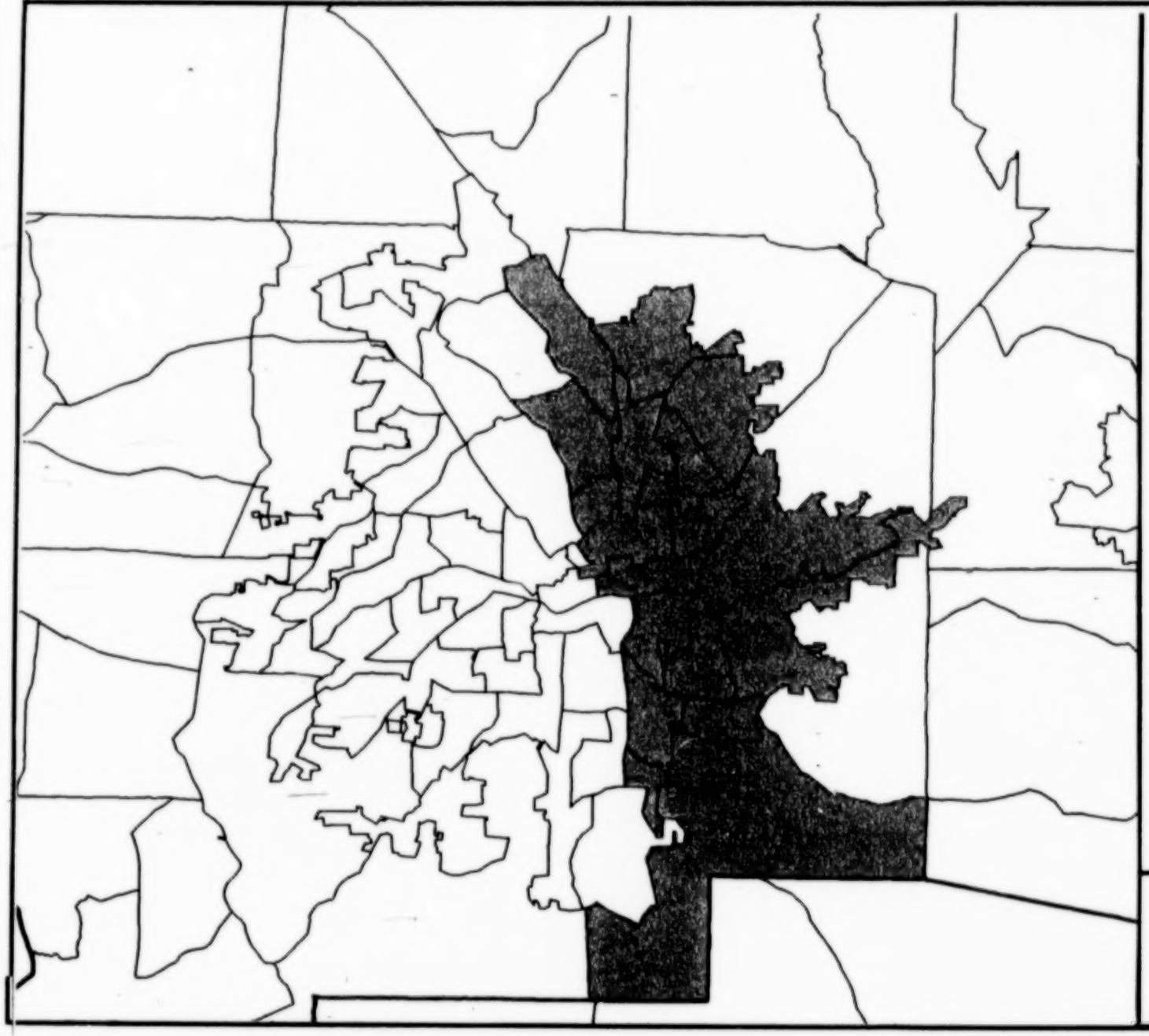
Precinct Registration Maps

Forsyth County District 12 Precincts 1a

Guilford County District 12 Precincts..... 2a

Mecklenburg County District 12 Precincts 3a

Forsyth County District 12 Precincts

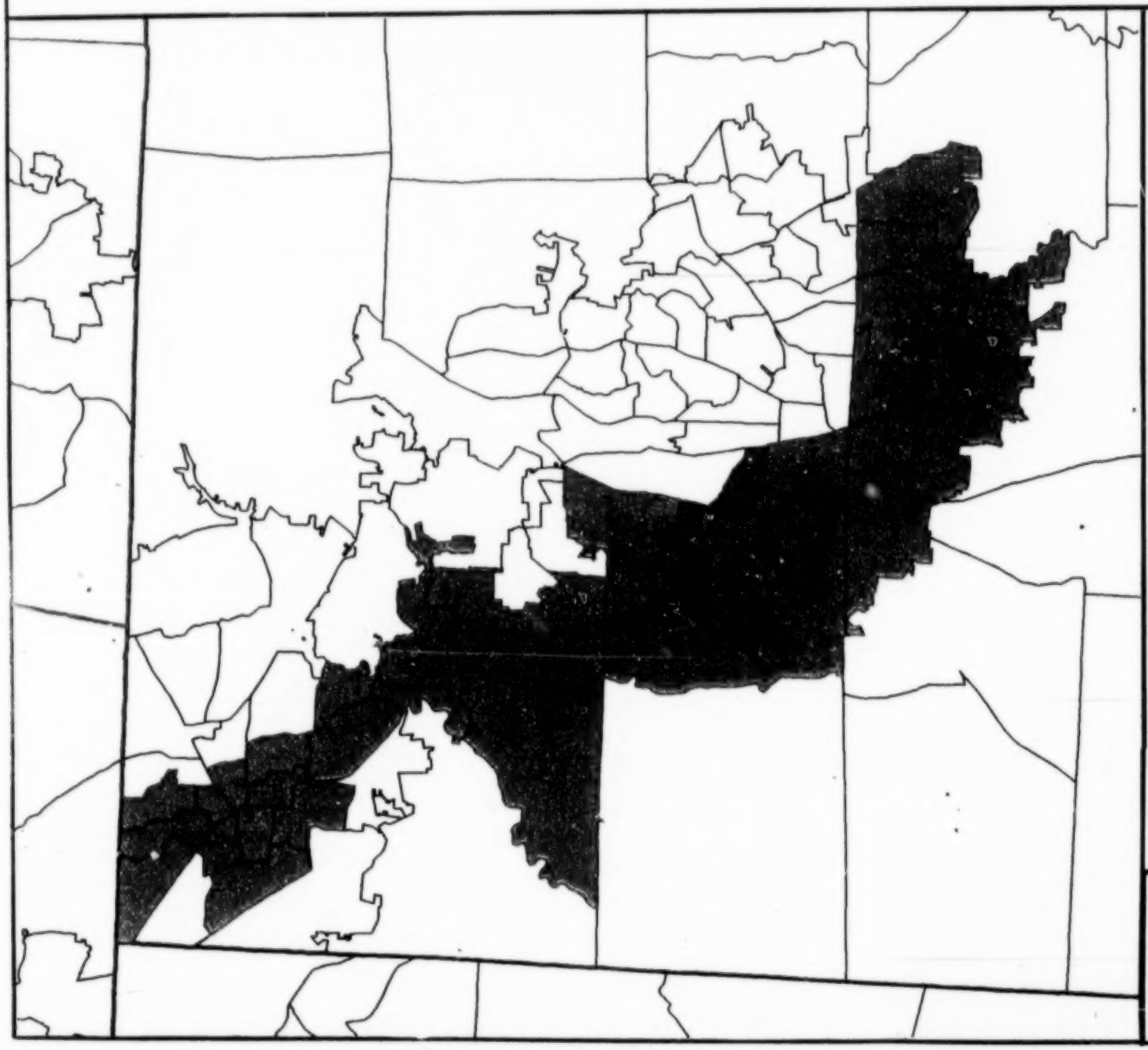


Legend

- County Boundary
- Precinct Boundary
- District Boundary
- District 12
- District 12 Precincts With Lower Democratic Registration Than One Or More Adjacent Non-District 12 Precincts

N.C. General Assembly,
Information Systems Division

Guilford County District 12 Precincts

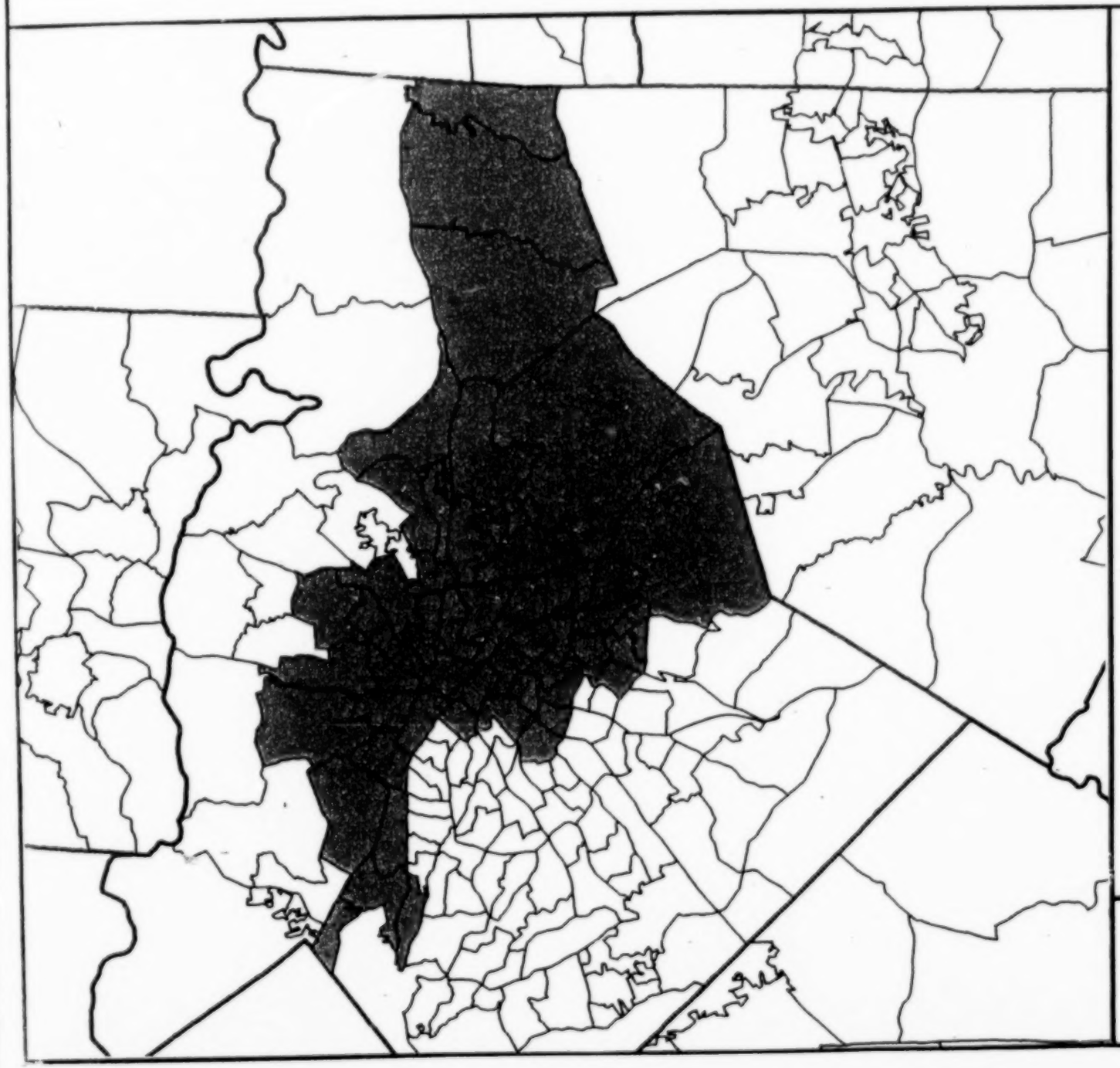


Legend

- County Boundary
- Precinct Boundary
- District Boundary
- District 12
- District 12 Precincts With Lower Democratic Registration Than One Or More Adjacent Non-District 12 Precincts

N.C. General Assembly,
Information Systems Division

Mecklenburg County District 12 Precincts



Legend

- County Boundary
- Precinct Boundary
- District Boundary
- District 12
- District 12 Precincts With Lower Democratic Registration Than One Or More Adjacent Non-District 12 Precincts

N.C. General Assembly,
Information Systems Division

Supreme Court, U.S.
FILED
SEP - 0 2000
CLERK

No. 99-1865

IN THE

Supreme Court of the United States

ALFRED SMALLWOOD, *et al.*,
Appellants,

v.

MARTIN CROMARTIE, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

BRIEF OF THE SMALLWOOD APPELLANTS

ELAINE R. JONES
DIRECTOR-COUNSEL

NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street
Suite 1600
New York, NY 10013
(212) 965-2200

TODD A. COX*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 Eye Street, N.W.
10th Floor
Washington, D.C. 20005
(202) 682-1300

ADAM STEIN
Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

**Counsel of Record*

Attorneys for Smallwood Appellants

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

45pp

QUESTIONS PRESENTED

1. Is a state congressional district subject to strict scrutiny under the Equal Protection Clause simply because it is slightly irregular in shape and contains a higher proportion of minority voters than adjacent districts, when (a) it is not a majority-minority district, (b) it complies with all of the race-neutral districting criteria the state adopted to govern the design of the entire apportionment plan, and (c) there is neither direct nor compelling evidence that race was the predominant factor in its design?

2. In a challenge to a state congressional district, brought under the jurisprudence established by this Court in *Shaw v. Reno* and its progeny, is an inference drawn from the challenged district's shape and racial demographics, standing alone, sufficient to support a finding for the plaintiffs on the contested issue of the predominance of racial motives in the district's design, when it is directly contradicted by the testimony of the legislators who drew the district and evidence that the district conforms with the state's articulated redistricting criteria?

3. Following a finding of unconstitutionality in a challenge to a state congressional district, brought under the jurisprudence established by this Court in *Shaw v. Reno* and its progeny, is it an abuse of discretion for a district court to order the state to conduct redistricting immediately when redistricting would cause disruption to ongoing election processes and when redistricting will occur anew following the imminent release of the 2000 Census data?

PARTIES TO THE PROCEEDINGS

Actual parties to the proceeding in the United States District Court were:

(1) James B. Hunt, Jr., in his capacity as Governor of the State of North Carolina, Dennis Wicker in his official capacity as Lieutenant Governor of the State of North Carolina, Harold Brubaker in his official capacity as Speaker of the North Carolina House of Representatives, Elaine Marshall in her official capacity as Secretary of the State of North Carolina, and Larry Leake, S. Katherine Burnette, Faiger Blackwell, Dorothy Presser and June Youngblood in their capacity as the North Carolina State Board of Elections, defendants, appellants herein,

(2) Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins, defendant-intervenors, appellant-intervenors herein,

(3) Martin Cromartie, Thomas Chandler Muse, R.O. Everett, J.H. Froelich, James Ronald Linville, Susan Hardaway, Robert Weaver and Joel K. Bourne, plaintiffs, appellees herein.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The Challenge to the Current Plan 2

B. Appeal of the Summary Judgment Decision 5

C. The District Court Trial on Remand 9

D. The District Court Opinion and the Current Appeal 13

SUMMARY OF ARGUMENT 17

ARGUMENT 18

Page

I. The Court Below Erred by Holding that Race Predominated in the Creation of the Twelfth Congressional District 18

A. The court erred by holding in effect that race-consciousness triggers "strict scrutiny" 19

B. The court erred by not giving proper weight to the political considerations that led to the creation of the Twelfth District 25

II. The District Court Erred by Failing to Assess Whether the District was Narrowly Tailored to Serve a Compelling Justification 28

III. The District Court Erred in Ordering Redistricting on the Eve of the Post-2000 Census Redistricting Cycle 31

CONCLUSION 36

TABLE OF AUTHORITIES

CASES

Page

Abrams v. Johnson, 521 U.S. 74 (1997) 21

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 6

Bush v. Vera, 517 U.S. 952 (1996) ..... *passim*

Cardona v. Oakland Unified School District, 785 F. Supp. 837 (N.D. Cal. 1992) 31

Chavis v. Whitcomb, 396 U.S. 1064 (1970) 34

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000) .. 21

Clark v. Calhoun County, 88 F. 3d. 1393 (5th Cir. 1996) 21, 30

Cosner v. Dalton, 522 F. Supp. 350 (E.D. Va. 1981) 32

Cromartie v. Hunt, 1998 U.S. Dist. LEXIS 7767 (E.D.N.C. Apr. 14, 1998) 1

DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff'd*, 515 U.S. 1170 (1995) 21, 25

Diaz v. Silver, 932 F. Supp. 462 (E.D.N.Y. 1996) 31

Dickinson v. Indiana State Election Bd., 933 F.2d 497 (7th Cir. 1991) 34

Page

Ely v. Klahr, 403 U.S. 108 (1971) 32, 33, 34

Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984), *aff'd in part and rev'd in part, sub. nom., Thornburg v. Gingles*, 478 U.S. 30 (1986) 11

Hunt v. Cromartie, 526 U.S. 541 (1999) ..... *passim*

Jenkins v. Red Clay Consolidated School District Bd. of Ed., 4 F.3d 1103 (3rd Cir. 1993) 29

Johnson v. De Grandy, 512 U.S. 997 (1994) 29

King v. State Board of Elections, 522 U.S. 1087 (1998) 21

Lawyer v. Department of Justice, 521 U.S. 567 (1997) 21, 25

Maryland Citizens for a Representative Gen. Assembly v. Governor of Maryland, 429 F.2d 606 (4th Cir. 1970) 33, 34

Maxwell v. Foster, No. 98-1378 (W.D. La. Nov. 24, 1999) 33, 35

Meeks v. Anderson, 229 F. Supp. 271 (D. Kan. 1964) ... 32

Miller v. Johnson, 515 U.S. 900 (1995) ..... *passim*

Republican Party of Shelby County v. Dixon, 429 U.S. 934 (1976) 32

Page

Republican Party of Virginia v. Wilder, 774 F. Supp. 400 (W.D. Va. 1991) 32

Reynolds v. Sims, 377 U.S. 533 (1964) 31, 32

Scott v. United States, 920 F. Supp. 1248 (M.D. Fla. 1996), *aff'd sub. nom., Lawyer v. Department of Justice*, 521 U.S. 567 (1997) 25

Shapiro v. Maryland, 336 F. Supp. 1205 (D. Md. 1972) 32

Shaw v. Hunt, 517 U.S. 899 (1996) ..... *passim*

Shaw v. Hunt, No. 92-202-CIV-5-BR (E.D.N.C. September 12, 1997) 4

Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996) 1

Shaw v. Reno, 509 U.S. 630 (1993) ..... *passim*

Shaw v. Reno, 808 F. Supp. 461 (E.D.N.C. 1992) 1

Sincock v. Roman, 233 F. Supp. 615 (D. Del. 1964) 32

Theriot v. Parish of Jefferson, 185 F.3d 477 (5th Cir. 1999) 21

Thornburg v. Gingles, 478 U.S. 30 (1986) 11

United States v. Hays, 515 U.S. 737 (1995) 20

Page

Watkins v. Mabus, 502 U.S. 954 (1991) 32

Wilson v. Eu, 1 Cal. 4th 707, 823 P.2d 545, 4 Cal. Rptr.2d 379 (1992) 21

White v. Daniel, 909 F.2d 99 (4th Cir. 1990) 33

STATUTES & RULES

28 U.S.C. § 1253 2

42 U.S.C. § 1973 ..... 15, 29

42 U.S.C. § 1973c 3

1997 N.C. Sess. Laws, Ch. 11 1

BRIEF OF THE SMALLWOOD APPELLANTS

Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins ("Smallwood Appellants"), white and African-American citizens and registered voters residing in the North Carolina Congressional Districts challenged in this litigation, appeal from the final judgment entered by the three-judge United States District Court for the Eastern District of North Carolina on March 8, 2000, which declares that the Twelfth Congressional District of North Carolina's 1997 congressional reapportionment plan, 1997 N.C. Sess. Laws, Ch. 11 ("1997 Remedial Plan"), violates the Fourteenth Amendment to the United States Constitution and enjoins further elections under that plan.

OPINIONS BELOW

The March 7, 2000 opinion of the three-judge district court is unreported and appears in the Appendix to the Jurisdictional Statement on Behalf of the State of North Carolina ("NC. J.S. App.") at 1a. The district court's final judgment, entered March 8, 2000, is unreported and appears at NC. J.S. App. at 71a. Previous decisions of earlier phases of this and related litigation are reported at *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993); *Cromartie v. Hunt*, 1998 U.S. Dist. LEXIS 7767 (E.D.N.C. Apr. 14, 1998); *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994); and *Shaw v. Reno*, 808 F. Supp. 461 (E.D.N.C. 1992).

JURISDICTION

The judgment of the court below was entered on March 8, 2000. The Smallwood Appellants filed their notice of appeal to this Court on March 13, 2000. Appendix to the Jurisdictional Statement on Behalf of the Smallwood Appellants

at 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment, reproduced at NC. J.S. App. at 73a..

STATEMENT OF THE CASE

A. The Challenge to the Current Plan

This case is a challenge to the 1997 Remedial Plan, which is the third congressional redistricting plan enacted by the North Carolina General Assembly since the 1990 Census. This Court's ruling in *Shaw v. Hunt*, 517 U.S. 899 (1996), concerned the second congressional redistricting plan enacted by the North Carolina legislature following the 1990 Census ("1992 Plan").[1] In *Shaw*, this Court held that the 1992 Plan was unconstitutional because the location and configuration of the Twelfth District violated the equal protection rights of some of the plaintiffs in the action. *Shaw*, 517 U.S. at 902.

On July 3, 1996, following the decision of this Court in *Shaw v. Hunt*, three residents of Tarboro, North Carolina,

[1]The first post-1990 Census North Carolina congressional reapportionment plan, enacted in 1991, contained one majority-African-American district that was 55.69 percent African-American in total population and 52.18 percent African-American in voting age population. This Court discussed the history of the first plan in *Shaw v. Reno*, 509 U.S. 630 (1993) and *Shaw v. Hunt*, 517 U.S. 899 (1996). The second post-1990 Census reapportionment plan, enacted in 1992, contained two majority-African-American districts (the First and Twelfth Congressional Districts), but the Twelfth Congressional District was held unconstitutional in *Shaw v. Hunt*.

Appellees herein, filed the complaint in this action (*Cromartie v. Hunt*), challenging the First District in North Carolina's 1992 Plan on the ground that it violated their equal protection rights because race predominated in the drawing of the district. A stay of that action was entered pending the resolution of the remand proceedings in *Shaw v. Hunt*.

On July 9, 1996 the same Tarboro residents joined the original *Shaw* plaintiffs in filing an Amended Complaint in *Shaw*, raising a similar challenge to and asserting the same claims against the First Congressional District as they raised in *Cromartie v. Hunt*. On July 11, 1996, the members of the Smallwood Appellant group (three voters from the First District and six voters from the Twelfth District) sought to intervene in the *Cromartie* suit as defendants.[2]

Following this Court's remand in *Shaw v. Hunt*, the North Carolina General Assembly convened to develop a redistricting plan to remedy the constitutional infirmities found by this Court. On March 31, 1997, the North Carolina General Assembly enacted the 1997 Remedial Plan and submitted it to the three-judge court in *Shaw v. Hunt*, No. 92-202-CIV-5-BR (E.D.N.C.).[3] The State also submitted the plan for preclearance by the United States Department of Justice pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. On June 9, 1997, the Department of Justice precleared the plan. *See* NC.

[2]The Smallwood Appellants also participated as intervenors in *Shaw v. Hunt* in the trial court and in this Court, including in the remedial proceedings which resulted in the approval of the 1997 Remedial Plan that is the subject of the present proceedings in this Court. *See infra.* p. 4.

[3]A map of the 1997 Remedial Plan is reproduced at NC. J.S. App. at 75a.

J.S. App. at 316a (*Shaw v. Hunt*, No. 92-202-CIV-5-BR, Memorandum Opinion (E.D.N.C. September 12, 1997)). On September 12,1997, the three-judge district court in *Shaw v. Hunt* unanimously approved the 1997 Remedial Plan as an adequate remedy for the specific constitutional violation found by this Court in *Shaw v. Hunt*. NC. J.S. App. at 312a. The three-judge court then dismissed the case after Appellees Cromartie and Muse, who were also plaintiffs in *Shaw v. Hunt*, chose not to present their claims that the 1997 Remedial Plan was unconstitutional to the *Shaw* three-judge court.

The *Cromartie* three-judge court lifted its stay of proceedings on October 17, 1997. On the same day, two of the three original plaintiffs, along with four residents of the Twelfth District, filed an amended complaint in the *Cromartie* action, challenging the 1997 Remedial Plan as a violation of the Equal Protection Clause and still seeking a declaration that the First District in the 1992 Plan is unconstitutional. Within the time allowed for answering that amended complaint, the Smallwood Appellants filed a renewed motion to intervene as defendants.

On March 31, 1998, the court below heard arguments on cross-motions for summary judgment and on the *Cromartie* plaintiffs' request for preliminary injunction.[4] On April 3, 1998,

[4]At the time of this hearing, the district court had not ruled on the motions to intervene of the Smallwood Appellants which had then been pending for over twenty months, or their renewed motion that had been pending for four months. The court issued its permanent injunction and granted summary judgment without ruling on these unopposed motions or holding a hearing on intervention. In fact, the district court refused to allow counsel for the Smallwood Appellants an opportunity to bring the motion to intervene before it and denied counsel for the Smallwood Appellants an opportunity to speak at the hearing.

the three-judge United States District Court for the Eastern District of North Carolina issued an order granting summary judgment to plaintiffs, declaring North Carolina's Twelfth Congressional District unconstitutional, permanently enjoining elections under the 1997 Remedial Plan, and ordering the State of North Carolina to submit a schedule for the General Assembly to adopt a new redistricting plan and to hold elections under that plan.[5] On April 14, 1998, the district court issued its opinion explaining its April 3, 1998 order.[6] NC. J.S. App. at 243a.

B. Appeal of the Summary Judgment Decision

This Court noted probable jurisdiction in *Hunt v. Cromartie* on September 29, 1998. Oral arguments were held January 20, 1999. On May 18, 1999, this Court unanimously

[5]Although the court had not yet released an opinion, the State of North Carolina moved for a stay of the injunction pending appeal. The district court denied this motion. The State then filed an application with this Court for a stay pending appeal, and the Smallwood Appellants filed an *amici curiae* memorandum in this Court in support of the application. This Court denied the request for a stay on April 13, 1998, with Justices Stevens, Ginsburg, and Breyer dissenting.

[6]On May 26, 1998, with their two prior unopposed intervention motions still pending, the Smallwood Appellants filed a third motion to intervene as defendants in the case. On June 20, 1998, after the deadline for filing a timely notice of appeal of the district court's April 3, 1998 order and April 6, 1998 judgment had passed, the district court ruled that the Smallwood Appellants were entitled to intervene as of right in this action. As the delay in granting the motions to intervene prevented them from fully participating as parties in the district court and prevented them from being able to exercise their right to appeal, the Smallwood Appellants filed in this Court on October 2, 1998 a motion to intervene as Appellants in this case. This Court granted the motion on October 19, 1998.

reversed the lower court's decision and remanded for further proceedings. Justice Thomas, in an opinion joined by the Chief Justice and Justices O'Connor, Scalia, and Kennedy,[7] first observed that the new Twelfth District was different than the original, noting that

> [t]he State's 1997 plan altered District 12 in several respects. By any measure, blacks no longer constitute a majority of District 12: blacks now account for approximately 47% of the district's total population, 43% of its voting age population, and 46% of registered voters. . . . The new District 12 splits 6 counties as opposed to 10. . . . With these changes, the district retains only 41.6% of its previous area. . . and the distance between its farthest points has been reduced to approximately 95 miles. . . .

Hunt v. Cromartie, 526 U.S. 541, 544 (1999) (citations omitted).

This Court also noted that, in evaluating a jurisdiction's motivation in creating a particular redistricting plan, a district court must engage in an inherently complex and "'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Id.* at 546 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)). This Court determined that the district court had failed to conduct such an inquiry and had improperly held that there were no material facts in dispute. Rather, the Court observed that "[t]he legislature's motivation is itself a factual question"

---

[7]Justice Stevens filed an opinion concurring in the judgment, in which Justices Souter, Ginsburg, and Breyer joined.

that was clearly in dispute. *Hunt v. Cromartie*, 526 U.S. at 549. This Court acknowledged that "Appellees offered only circumstantial evidence in support of their claim," including maps of the District and statistical and demographic data. *Hunt v. Cromartie*, 526 U.S. at 547. However, this Court pointed to evidence that the legislature created the district "with the intent to make District 12 a strong Democratic district," *id.*, including the testimony of two legislative leaders, who testified that the district lines are best explained by partisanship.

In addition, this Court found the testimony of the State's expert political scientist, Dr. David Peterson, probative. Dr. Peterson examined racial demographics, party registration and election results from the precincts within the district and those surrounding it. He found a strong correlation between the racial composition of the precincts and party preference, such that in precincts with large proportions of African-Americans, voters tend to vote for Democrats at a high rate and in precincts with low proportions of African-Americans, voters tend to support Democratic candidates at a significantly lower rate. Based upon Peterson's testimony, this Court reasoned that "the data tended to support both a political and racial hypothesis," *id.* at 550, as well as "an inference that the General Assembly did no more than create a district of strong partisan Democrats." *Id.* The Court also found Peterson's affidavit "significant in that it weakens the probative value of appellees' boundary segment evidence, which the District Court appeared to give significant weight." *Id.*

In contrast, this Court found that Appellees' limited analysis of a few selected precincts was insufficient to support a summary judgment that the plan was an unconstitutional racial gerrymander. Thus, while in a few instances the State had

excluded from the Twelfth District precincts with lower proportions of African-American voters but equal or higher proportions of *registered* Democratic voters than the precincts included within the district, *id.* at 548, this was not an adequate basis to support the entry of summary judgment for the plaintiffs. On the other hand, the State's expert, Dr. Peterson, was more thorough, analyzing *all* of the precincts bordering the interior and exterior of the district and examining actual voting results, not just registration data. *Id.* at 550. "Moreover, appellees' maps reported only party registration figures. Peterson again was more thorough, looking also at actual voting results." *Id.* The Court found Dr. "Peterson's more complete analysis was significant because it showed that in North Carolina, party registration and party preference do not always correspond." *Id.* at 551 (footnote omitted).

In light of this evidence, this Court held that Appellees were not entitled to summary judgment. Citing prior precedents, this Court stated that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be African-American Democrats and even if the State were *conscious* of that fact," *id.*, at 542 (emphasis in the original) (citations omitted), and that, based on the record before it, the motivation behind the creation of the district was in dispute and "it was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgement stage." *Hunt v. Cromartie*, at 552. Therefore, this Court reversed the lower court's judgment and remanded.

C. The District Court Trial on Remand

From November 29, 1999 to December 1, 1999, the district court held a trial during which it heard evidence

regarding the rationale for the configuration of the 1997 Remedial Plan. State legislators testified at trial that in 1997, the General Assembly had two primary redistricting goals. The first was to remedy the constitutional defect found by this Court in the 1992 Plan: the predominance of racial considerations underlying the shape and location of the Twelfth District. NC. J.S. App. at 82a - 83a, 138a; Joint Appendix ("Jt. App.") at 179, 190-191.[8] The second, but equally important, goal was to preserve the even partisan balance (six Republican and six Democratic members) in North Carolina's then-existing congressional delegation. Jt. App. at 180-182, 241. Meeting the second goal of preserving the same partisan balance in the congressional delegation was essential to ensure that the General Assembly would be able to agree on a remedial plan, since the State House of Representatives was controlled by Republicans and the State Senate was controlled by Democrats. *Id.*

The General Assembly accomplished the first goal of enacting a plan free of constitutional defects by utilizing a variety of different redistricting techniques, including: 1) avoiding division of precincts and counties whenever possible; 2) avoiding use of narrow corridors to connect concentrations of minority voters; 3) striving for geographical compactness without use of artificial devices such as double cross-overs or point contiguity; 4) pursuing functional compactness by grouping together citizens with similar interests and needs; and 5) seeking to create districts that provide easy communication

---

[8] Although the First District in the 1992 Plan was never determined to be unconstitutional, the General Assembly elected to redraw the First District in 1997 to ensure its compliance with the post-1990 census decisions. Jt. App. at 234, 238-239.

among voters and their representatives. NC. J.S. App. at 83a, 138a; Jt. App. at 179.

State legislators testified, and the trial record reflects that during the 1997 redistricting process the General Assembly considered but ultimately rejected proposed plans that would have created a second majority-minority district in the area east of Charlotte toward Cumberland and Robeson Counties. Several groups and individuals, including the North Carolina Association of Black Lawyers and State Representative Mickey Michaux, objected to the 1997 Remedial Plan because, in their view, it diluted the voting strength of African-Americans in certain areas of the state and "deliberately separate[d] large politically cohesive African-American communities." *See Shaw v. Hunt*, No. 92-202-CIV-5, Memorandum in Support of Motion to Intervene (E.D.N.C. filed April 15, 1997).[9]

While the State was predominantly motivated by a desire to remedy this Court's finding of liability and to meet various political interests, the trial record indicates that the General Assembly also had before it an extensive record concerning the

---

[9]Indeed, the majority of African-American legislators in the North Carolina House of Representatives voted against the 1997 Remedial Plan. *See* NC. J.S. App. at 140a; Jt. App. at 242. The plan favored by those opposed to the 1997 Remedial Plan was designed to avoid dilution, but it also would have combined African-American voters in Charlotte with voters, including African-American and Native American voters, in rural areas southeast of Charlotte. The General Assembly majority concluded that such a district would have combined urban and rural voters with disparate and divergent economic, social and cultural interests and needs. Jt. App. at 385. Also, the General Assembly concluded that the proposed district lacked a natural means of communication and access among its residents and would have thwarted the goal of maintaining partisan balance in the State's congressional delegation. *Id.* at 200-201, 385.

historical exclusion of African-American voters, continuing racial appeals in North Carolina election contests, the socio-economic disparities affecting African-American voters' opportunities to participate in the political process, the lack of success of African-American candidates, and the continuing prevalence of racially polarized voting in North Carolina. *See* NC. J.S. App. at 34a. Plaintiffs stipulated for purposes of trial that: 1) the African-American population is politically cohesive; 2) the white majority votes sufficiently as a bloc to enable it often to defeat the minority's preferred candidate; 3) for many decades African-Americans in North Carolina were victims of racial discrimination; and 4) a substantial majority of the State's African-American population is still at a disadvantage in comparison to white citizens with respect to income, house, education, and health. *Id. See also, e.g., Gingles v. Edmisten*, 590 F. Supp. 345, 359 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986); Jt. App. at 407-411, 433-437; Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing Transcript, February 26, 1997 at 19-22; *id.*, Ex. 6, Tab 17 (Expert Report of Dr. J. Morgan Kousser) ("Kousser Report"); *id.* at Ex. 6, Tab 17 (*Shaw v. Hunt*, Defendant-Intervenor stipulations) Nos. 1-58, 64-67).

Evidence at trial showed that the General Assembly succeeded in reaching its stated redistricting goals, particularly in creating the Twelfth District. While the 1992 Plan divided 80 precincts and 44 counties, the 1997 Remedial Plan divides only two precincts and 22 counties. The Twelfth District in the 1997 Remedial Plan is significantly more compact geographically than it was in the 1992 Plan. The new Twelfth District contains

parts of six counties, rather than ten, has no areas of "point contiguity" and does not contain any "cross-overs" or "double-cross-overs" as did the 1992 Plan. In the 1992 plan, the Twelfth District's boundaries divided 48 precincts, while the Twelfth District in the 1997 Remedial Plan divides only one. *See, e.g.*, NC. J.S. App. at 84a.[10]

The trial record demonstrates that the boundaries of the new Twelfth District were determined predominantly by partisan considerations and a desire to have an essentially urban, Democratic district in the Piedmont region. NC. J.S. App. at 84a. While the configuration of the Twelfth District reflects the strong correlation between the racial composition of the precincts and party preference of African-Americans in the district, NC. J.S. App. at 156a-157a, 170a-171a; Jt. App. at 246-248, the Twelfth District's African-American total population was reduced from the original 56.63 percent in the 1992 Plan to 46.67 percent and the voting-age population was reduced from the original 53.34 percent in the 1992 plan to 43.36 percent.[11] NC. J.S. App. at 77a-79a.

---

[10] *See also Hunt v. Cromartie at* 544 ("By any measure, blacks no longer constitute a majority of District 12: blacks now account for approximately 47% of the district's total population, 43% of its voting age population, and 46% of registered voters. . . . The new District 12 splits 6 counties as opposed to 10. . . . With these changes, the district retains only 41.6% of its previous area. . . and the distance between its farthest points has been reduced to approximately 95 miles. . . .") (citations omitted).

[11] The trial record also shows that the Twelfth District's residents share a distinct community of interest. *See, e.g.*, NC. J.S. App. at 84a; Jt. App. at 383.

D. The District Court Opinion and the Current Appeal

On March 7, 2000, over three months after the conclusion of the trial, the district court issued its decision. In an opinion strikingly similar to its prior summary judgment ruling, the Court found as a matter of fact, based upon the uncontroverted testimony of Senator Roy A. Cooper, that the House and Senate General Assembly committees formed to address the defects found by this Court "aimed to identify a plan which would cure the constitutional defects and receive the support of a majority of the members of the General Assembly." NC. J.S. at 11a. The court also accepted the uncontroverted affidavit testimony of Senator Cooper and Gary O. Bartlett, Executive Secretary-Director, State Board of Elections, that "[i]n forming a workable plan, the committees were guided by two avowed goals: (1) curing the constitutional defects of the 1992 Plan by assuring that race was not the predominant factor in the new plan, and (2) drawing the plan to maintain the existing partisan balance in the State's congressional delegation." *Id.* The court below also found that the 1997 Remedial Plan met the goal of maintaining the existing partisan balances by "avoid[ing] placing two incumbents in the same district" and "preserv[ing] the partisan core of the existing districts to the extent consistent with the goal of curing the defects in the old plan." *Id.* The court cited no evidence that directly contradicted the testimony introduced by the State to the effect that the legislature sought, in creating the 1997 Remedial Plan, to cure the constitutional defects found by this Court by ensuring that race did not predominate in its creation while minimizing partisan and political disruption.

Nevertheless, the court below found that race was the predominant factor in the creation of the 1997 Remedial Plan

based largely upon its own assessment of (a) the Twelfth District's racial demographics and shape, (b) the racial characteristics of a limited number of precincts that were or were not included in the district, and (c) mathematical measures of the Twelfth District's relative compactness. *Id.* at 11a-17a While the court asserted that "[a] comparison of the 1992 District 12 and the present District is of limited value here," *id.* at 24a, it nevertheless observed that the Twelfth District in the 1997 Remedial Plan is as "unusually shaped" as the Twelfth District in the 1992 Plan. *Id.* Focusing almost exclusively on demographic data and the district's configuration, the court found "as a matter of fact that the General Assembly, in redistricting, used criteria with respect to the Twelfth District that are facially race driven." *Id.* at 28a. Finally, despite extensive conflicting factual evidence, the court below concluded that "[t]he legislature eschewed traditional districting criteria such as contiguity, geographical integrity, community of interest, and compactness in redrawing the District as part of the 1997 Plan." *Id.* at 29a.

The court found that no evidence of a compelling justification for the creation of the Twelfth District was presented and determined that "even if such an interest did exist, the 12th District is not narrowly tailored and therefore cannot survive the prescribed 'strict scrutiny'." *Id.* The lower court, thus, never proceeded to assess whether the Twelfth District was narrowly tailored to satisfy an identified compelling justification.[12] Instead, the court proceeded to conclude that

[12]Therefore, the court never considered or discussed whether the creation of the Twelfth District could be justified by a compelling interest in remedying the current effects of North Carolina's long history of political exclusion and in avoiding dilution of minority voting strength. The

"District 12 is an impermissible and unconstitutional racial gerrymander in violation of the Equal Protection Clause" and ordered the State to "redistrict the 1997 Plan in such a way that it *avoids the deprivation of the voters' equal protection rights not to be classified on the basis of race*," leaving the State "free to use *other, proper* factors in redistricting the 1997 Plan." *Id.* (emphasis added).

While ruling that race was also the predominant factor in the creation of District 1, the court held that the district was narrowly tailored to meet North Carolina's compelling state interest of complying with Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 ("Section 2"). NC. J.S. App. at 34a. In addition, the district court found that the configuration of the First District also "address[ed] other traditional, political considerations, including the desire to protect incumbency, both of a Democrat in the First District and a Republican in the Third District." *Id.*

District Court Judge Thornburg, sitting by designation as Circuit Judge, joined the majority insofar as it held that the First District is constitutional; however, *inter alia*, he dissented from the majority opinion that the Twelfth District is an unconstitutional racial gerrymander. Judge Thornburg acknowledged the difficult challenges that confronted the North Carolina General Assembly during the 1997 redistricting

court ignored evidence presented by the State that its "primary goals [of remedying the constitutional defects found in the 1992 Plan and preserving partisan balances in the congressional delegation] were accomplished while still providing minority voters a fair opportunity to elect representatives of their choice in at least two districts (Districts 1 and 12)," Jt. App. at 384, and that the Twelfth District affords African-American voters a fair chance to elect their candidate of choice. Jt. App. at 386.

process. Judge Thornburg found that the State faced a myriad of "conflicting agendas and influences," including incumbency considerations and partisan political concerns. *Id.* at 38a. Judge Thornburg concluded that the majority was incorrect to conclude that from this "cauldron" race emerges as the predominant motivating factor leading to the creation of the Twelfth District. *Id.* He suggested that it would be impossible for the State to "navigate these treacherous waters without being aware of the issue of race," since "race loomed as *the* reason why the General Assembly had to redraw districts in the first place." *Id.* at 38a-39a (emphasis in the original). However, he concluded that it was improper for the majority to determine that race "impermissibly predominated, in a process where consciousness of race is not prohibited." *Id.* at 39a (footnote and citations omitted). In so concluding, the majority failed to hold the plaintiffs to their burden of proof and properly credit the testimony of the two state legislators who drove the 1997 redistricting process. *Id.*

Judge Thornburg determined that the majority "fail[ed] to evaluate the redistricting process within the context of the legislative environment where such decisions occur." *Id.* at 46a. Judge Thornburg found that any plan that was to pass the legislature had to receive bi-partisan support from both houses and, therefore, the legislative leadership "set out to design a plan which, in addition to addressing the constitutional deficiencies of past plans, would protect incumbents and thereby maintain the then existing 6-6 partisan split amongst North Carolina's congressional delegation." *Id.* Furthermore, Judge Thornburg reasoned that "[b]ecause both the First and Twelfth Districts had Democratic incumbents, and maintaining the 6-6 split was viewed as imperative, preserving a strong Democratic

Twelfth District which protected incumbent Mel Watts' [sic] political base was absolutely necessary." *Id.* at 46a-47a. In doing so, Judge Thornburg held that "common sense as well as political experience dictated ascertaining the strongest voter performing Democratic precincts in the urban Piedmont Crescent." *Id.* Indeed, Judge Thornburg found that precincts were included in the Twelfth District "based primarily upon their Democratic performance, not their racial make-up." *Id.* Thus, he concluded that it was not a constitutional violation "[t]hat many of those strong Democratic performing precincts were majority African-American, and that the General Assembly leaders were aware of that fact." *Id.* (footnote omitted). Racial considerations were merely part "of the numerous political considerations which legislative leaders had to account for in designing a plan which would pass." *Id.* at 48a.

SUMMARY OF ARGUMENT

In striking down North Carolina's Twelfth Congressional District, the district court misapplied this Court's precedents and imposed its own subjective redistricting preferences as the measure of the district's constitutionality. The court erred in several critical respects.

First, the lower court erred by conflating any consciousness or awareness of race with the application of strict scrutiny and a finding that the Twelfth District is a racial gerrymander. In so doing, the lower court decision not only ignores the law of the case, *Cromartie v. Hunt*, but erects an invidious racial double standard for the African-American voters in the Twelfth Congressional District. Second, the court erred by failing to examine whether any compelling justification could exist for the creation of the challenged district. Third, the district court exceeded its authority in ordering that the state

develop a remedy after the election process had begun and only a year before a new plan would have to be developed following the release of the 2000 census data.

The district court's decision, if upheld, would render meaningless this Court's prior holdings, but particularly *Cromartie v. Hunt*, in which this Court refused to equate mere consciousness of race with unconstitutional racial gerrymandering. In clear contravention to this Court's decision in *Cromartie*, the district court's reasoning would apply strict scrutiny to all districts drawn for political purposes even if race was found to be only one of several factors in the redistricting process.

ARGUMENT

I. The Court Below Erred by Holding that Race Predominated in the Creation of the Twelfth Congressional District

As noted *supra* in the Statement of the Case, the court below failed to assess most of the evidence presented by the Defendants and Defendant-Intervenors at trial. Instead, the court primarily recited statistics concerning the racial composition and political party registration of voters in a small number of precincts placed inside or outside of the Twelfth District. Without even addressing the other factors that state legislators took into account in the redistricting process, the court concluded from its limited factual recitation not only that the 1997 Remedial Plan was race-conscious, but also that it must be struck down as motivated *predominantly* by racial considerations. Indeed, the district court ordered that, in designing its remedy, the State must limit the factors it could use in its redistricting to those other than race, characterizing

only those non-racial factors as proper. *See* NC. J.S. App. at 29a.

This ruling amounted to a holding, contrary to this Court's repeated admonitions, that race-conscious districting is inherently unconstitutional. Such a rule would eviscerate the protections against minority vote dilution provided by Section 2, and is flatly inconsistent with *Shaw v. Reno* and its progeny, as well as this Court's precedent in this case. The judgment below must, therefore, be reversed.

A. The court erred by holding in effect that race-consciousness triggers "strict scrutiny."

This Court has held that Appellees' evidentiary burden in this case is to "prove that District 12 was drawn with an impermissible racial motive – in this context, strict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision." *Hunt v. Cromartie*, 526 U.S. at 547. To carry this burden, Appellees must show that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," *Bush*, 517 U.S. at 952 (*quoting Miller*, 515 U.S. at 913), and "that other, legitimate districting principles were 'subordinated' to race." *Bush*, 517 U.S. at 958. *See generally id.* at 259-68. Merely showing that the State of North Carolina conducted the redistricting process with some "consciousness of race" is not sufficient. *See Bush*, 517 U.S. at 1051. Rather, this Court has acknowledged the reality that a state "'always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors" but held that "[this] sort of race consciousness does not lead inevitably to impermissible race discrimination'" *United States v. Hays*, 515 U.S. 737, 745

(1995) (citation omitted) (emphasis in original). As Justice O'Connor has observed:

> States may intentionally create majority-minority districts and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected, *and* that neglect is predominantly due to the misuse of race, does strict scrutiny apply.

Bush, 517 U.S. at 993 (O'Connor, J., concurring) (emphasis in original).

The burden that Appellees carry in this case is heavy and cannot be met simply by pointing to evidence of race-consciousness. In *Shaw v. Reno*, 509 U.S. at 653, this Court held that it would be the *extraordinary* case in which strict scrutiny would apply. Indeed, in *Shaw*, *Miller*, and *Bush*, the district courts applied strict scrutiny only after they determined that race played a *predominant* role in the design of the districts at issue. *Miller*, 515 U.S. at 928 (O'Connor, J., concurring); *Shaw v. Hunt*, 517 U.S. at 903; *Bush*, 517 U.S. at 952. And those determinations were not based upon mere "race consciousness." For example, in *Shaw v. Hunt*, this Court found sufficient "direct evidence" that the State's "overriding purpose" was to "create two congressional districts with effective black voting *majorities*" and that other considerations "came into play only after the race-based decision had been made." *Shaw v. Hunt*, 517 U.S. at 906 (original emphasis omitted and emphasis added). In *Miller*, the State conceded that the district at issue was the "product of a desire by the General Assembly to *create a majority black district*," *Miller*, 515 U.S. at 918 (emphasis added), and that the creation of the district "violate[d] all reasonable standards of compactness and

contiguity." *Id.* at 919. This Court has repeatedly recognized the reality of race-consciousness during the redistricting process and has reserved strict scrutiny only for those circumstances where race predominated,[13] and this principle has been consistently applied by various district and appellate courts that have considered constitutional challenges based upon *Shaw*. *See, e.g.*, *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Theriot v. Parish of Jefferson*, 185 F.3d 477 (5th Cir. 1999); *Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff'd*, 515 U.S. 1170 (1995).[14]

This Court has also now clearly defined *in this case* the

---

[13] *See, e.g., Bush*, 517 U.S. at 958 ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Nor does it apply to all cases of intentional creation of majority-minority districts") (citations omitted); *Lawyer v. Department of Justice*, 521 U.S. 567 (1997) (upholding the constitutionality of a Florida state legislative districting plan that was drawn with conscious consideration of race to settle litigation challenging prior plan, creating majority-minority district that afforded minority voters opportunity to elect candidates of choice that was somewhat irregularly shaped and that split county and city boundaries); *Abrams v. Johnson*, 521 U.S. 74 (1997) (approving congressional districting plan for Georgia having majority-African-American district); *King v. State Board of Elections*, 522 U.S. 1087 (1998) (*per curiam*) (summarily affirming district court ruling upholding the constitutionality of Illinois' Fourth Congressional District).

[14] A further understanding of the *DeWitt* decision can be gained by reviewing the decision of the California Supreme Court that created the redistricting plans challenged in *DeWitt*. *See Wilson v. Eu*, 823 P.2d 545, 563-64, 582, 583-84, 594, 1 Cal. 4th 707, 746, 775, 776, 790, 4 Cal. Rptr. 2d 379, 397-8, 416, 417-8, 428 (1992) (describing the various special efforts taken to create districts that would comply with the Voting Rights Act).

proper role race may play in a state meeting its various political objectives during the redistricting process, holding that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. at 542 (emphasis in the original) (citing *Bush*, 517 U.S. at 968; *Shaw v. Hunt*, 517 U.S. at 905; *Miller*, 515 U.S. at 916; *Shaw v. Reno*, 509 U.S. at 646).

> Evidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference.

Hunt v. Cromartie, 526 U.S. at 542.

Appellees' evidentiary presentation below was completely inadequate to satisfy this Court's stringent burden of proof.[15] As Judge Thornburg observed in dissent:

---

[15]Appellees introduced one e-mail from a staff member of the General Assembly, referring to a modification moving "black voters" into the Twelfth District, which appellees have characterized as "smoking gun" evidence establishing the predominance of legislative racial motivations. However, as Judge Thornburg found below, "this anecdotal evidence does little more than reinforce what is already known, and what is not constitutionally impermissible: North Carolina's legislative leaders were conscious of race, aware of racial percentages, on notice of the potential constitutional implications of their actions, and generally very concerned with these and every other political and partisan consideration which affected whether or not the redistricting plan would pass." NC. J.S. App. at 48a. Thus, given that context, the language of the e-mail offers little to assist appellees in meeting their substantial burden of proof in this case of showing that race was the *predominant* factor in the 1997 redistricting and "certainly do[es] not amount to the 'smoking gun' status which Plaintiffs would have the Court believe." *Id.*

> Plaintiffs [sic] evidence does nothing more than address the admitted fact that legislative leaders were aware of the race issue, or perhaps that the Twelfth District could have possibly been drawn in a different way to accomplish the legislature's stated goals. Such evidence does not meet Plaintiffs' heavy burden of showing by a preponderance of the evidence that racial motives predominated in substantial disregard of legitimate districting criteria.

NC. J.S. App. at 55a.

The court below failed to make findings comparable to those that led this Court to invalidate redistricting plans in *Shaw* and *Miller*. The lower court also made no findings that would permit it to assess the interrelationship between race and politics as required by this Court in *Hunt v. Cromartie*. In fact, the record below demonstrated that race did not *predominate* in the creation of the district. The Twelfth District in the 1997 Remedial Plan is significantly more compact geographically than it was in the 1992 Plan. The new Twelfth District contains parts of six counties, rather than ten, and it does not have any areas of only "point contiguity." In the 1992 plan, the Twelfth District's boundaries divided 48 precincts, while the 1997 Remedial Plan divides only one. The boundaries of the new Twelfth District were determined by partisan considerations and a desire to have an urban, Democratic district in the Piedmont

region. *See* Jt. App. at 180-182, 241; NC. J.S. App. at 81a-87a; *Id.* at 138a-140a. While the African-American voting-age population was originally 53.34 percent in the 1992 plan, it was reduced to 43.36 percent in the 1997 Remedial Plan. NC. J.S. App. at 53a, 77a-79a.

Moreover, the record below demonstrates that the voters in the Twelfth District constitute a distinct community of interest and that this was evident to the General Assembly when it created the district. *See* Jt. App. at 383; NC. J.S. App. at 53a-54a, 84a. As Judge Thornburg noted in dissent, "Senator Cooper felt that maintaining this community of interest was one of the legislature's motivating factors, and indeed, the 1997 Twelfth District as drawn reflected and protected the clear community of interest in the Piedmont Crescent." NC. J.S. App. at 54a.

Proof that, in addition, the Twelfth District included strong Democratic performing precincts, that a number of these precincts were majority African-American, and that those leading the redistricting process were aware of these facts, does not establish a violation of the Constitution. For the lower court essentially to hold otherwise vitiates this Court's ruling on the earlier appeal in this case that permits a state to meet its partisan political goals even if it is aware of the race of the voters as it undertakes this process. The decision below would automatically render any plan drawn with even the mere awareness of race unconstitutional, and therefore, it should be reversed.

B. The court erred by not giving proper weight to the political considerations that led to the creation of the Twelfth District.

By ignoring this Court's precedents, including the law of this case, *Hunt v. Cromartie*, the court below also failed to give any consideration – much less appropriate weight – to the important political realities confronted by the General Assembly during the redistricting process. Although the General Assembly's primary goals in enacting the 1997 Remedial Plan were to correct the prior constitutional violation found by this Court in *Shaw v. Hunt* and to preserve the congressional delegation's partisan balance, the State could not achieve these goals in a political vacuum. As the testimony showed, among other political considerations, legislators were concerned that the plan developed be racially fair. Jt. App. at 211-212, 241, 384-386. This was not only important given the history of political exclusion and discrimination that was in the record before the General Assembly members, but it was also necessary to achieve the political goal of securing enough support for the 1997 Remedial Plan from among African-American political and legislative leaders in the General Assembly. *See* Jt. App. at 241. Such considerations do not relegate a redistricting plan to strict scrutiny. *See Lawyer*, 521 U.S. at 581 (upholding the constitutionality of a majority-minority district that district court found "'offers . . . any candidate, without regard to race, the opportunity' to seek and be elected to office") (quoting and citing *Scott v. United States*, 920 F. Supp. 1248, 1256 (M.D. Fla. 1996)); *DeWitt*, 856 F. Supp. at 1413-14 (finding that the California redistricting plan, containing intentionally created majority-minority districts, was not an unconstitutional racial gerrymander because the plan "evidences a judicious and proper

balancing of the many factors appropriate to redistricting, one of which was the consideration of the application of the Voting Rights Act's objective of assuring that minority voters are not denied the chance to effectively influence the political process").

In rejecting the political rationale for the creation of the Twelfth District, the lower court established an invidious racial double standard. Appellees argued, and the lower court held, that the inclusion of substantial numbers of African-American voters in the Twelfth District automatically indicates an illegal racial purpose. The lower court ruling also tacitly endorses a principle that Appellees raised at trial and throughout this case: it is constitutionally suspect for the state to attempt to preserve the core of former Districts 1 and 12 in an attempt to protect the incumbency of the representatives of those districts. *See, e.g.*, Trial Transcript, Volume I, December 1, 1999 at 557 and 602; Final Pretrial Order at 10. Judge Thornburg observed:

> Plaintiffs contend that any district which is based on the 'footprint' of a prior unconstitutional district is inherently invalid. This suggests that the legislature *must* begin with a completely clean slate in order to wipe away the vestiges of prior unconstitutional districts. . . .

NC. J.S. App. at 44a.

It is undisputed that "every one of the majority African-American precincts included in the Twelfth District are among the highest, if not the highest, Democratic performing districts in that geographic region." Jt. App. at 50a. The political decision to include the best performing Democratic precincts into districts of Democratic incumbents in an effort to preserve the incumbency of the existing Democratic members of

Congress was replicated throughout the 1997 redistricting process. *See, e.g.*, Jt. App. at 180-182, 211, 241. Indeed, it is undisputed that the State sought to protect *all* incumbent members of its congressional delegation, white *and* African American. *Id.* Ignoring this political reality would have proved fatal to the plan, as Judge Thornburg concluded:

> [R]equiring a legislature to start completely from scratch makes their task nearly impossible because congressional incumbents and state legislators will invariably demand the preservation of as much of the geographic core of districts as possible, a political reality explained in testimony at the trial. Indeed, the undersigned can think of no reason why a legislature may not simply address the offensive aspects of an unconstitutional district, cure those defects, and thereby create a constitutional district.

NC. J.S. App. at 44a-45a.

Since ten of twelve members of that delegation were white, incumbency protection in and of itself hardly suggests that racial motives were predominant. Invalidating the State's political decision to secure the reelection chances also of the Twelfth District's incumbent places limits on the electoral choices of the Twelfth District's African-American Democrats to elect their candidate of choice, a restriction inapplicable to the majority of the State's other voters. Moreover, to disregard the protection of the incumbent only in the Twelfth District would deprive the voters of that district – and only those voters in the state – of the opportunity to maintain representation by an experienced legislator if they chose to do so. Thus, the lower court and Appellees urge the adoption of a double standard that is intolerable under the decisions of this Court.

See, e.g., Miller v. Johnson, 515 U.S. at 928 (O'Connor, J., concurring); *Shaw v. Hunt*, 517 U.S. at 996 (Kennedy, J., concurring).

Indeed, as this Court has now repeatedly held, the standard adopted by the lower court is not correct. Legislative consideration of a non-racial factor, such as incumbency protection, that is *correlated* with race is insufficient to demonstrate predominance unless the court finds that it was a proxy for race. *See Hunt v. Cromartie*, 526 U.S. at 542; *Bush v. Vera*, 517 U.S. at 967-69. The court decision below was erroneous both as a matter of fact and as a matter of law and should be reversed.

II. The District Court Erred by Failing to Assess Whether the District was Narrowly Tailored to Serve a Compelling Justification

Even if the district court was correct to find that race was the predominant factor affecting the drawing of the Twelfth District, the court erred by failing to consider whether the district was narrowly tailored to achieve an identified compelling governmental interest.

As discussed *supra*, the district court concluded that, in drafting the 1997 Remedial Plan, the State disregarded traditional redistricting criteria and found that race was the predominant factor in the creation of the Twelfth District. However, the court never engaged in the necessary analysis to assess whether the Twelfth District was narrowly tailored to satisfy an identified compelling justification. Instead, the court simply announced that "no evidence of a compelling state interest in utilizing race to create the new 12th District has been

presented."[16] NC. J.S. App. at 29a. However, that was apparently irrelevant to the lower court, since it then determined that "*even if* such an interest did exist, the 12th District is not narrowly tailored and therefore cannot survive the prescribed 'strict scrutiny.'" *Id.* (emphasis added). Since the question of narrow tailoring can be determined only in relationship to the compelling interest to be served, this demonstrates that the lower court never conducted the required analysis to determine whether the Twelfth District was narrowly tailored to satisfy a specified compelling justification.

This error is most directly analogous to that which some district courts have made in applying Section 2. After determining whether the plaintiffs in a Section 2 case have met their burden of demonstrating the existence of the three primary *Gingles* factors, courts are required to determine whether, in light of those factors and the totality of circumstances, the electoral system violates Section 2 because black voters enjoy "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973; *Johnson v. De Grandy*, 512 U.S. 997 (1994). It is error for a court to ignore this critical step, either by referring only to the analysis in passing or by hypothesizing that, even were it to have conducted the analysis, it would have ruled against plaintiffs. Because of the importance of this analysis to the Section 2 inquiry, the Courts of Appeals have held that the "totality" inquiry cannot be carried out in dicta. *See Jenkins v. Red Clay Consolidated School District Bd. of Ed.*, 4 F.3d 1103, 1135 (3rd Cir. 1993)

---

[16]This finding is clearly erroneous in light of the parties' stipulation referred to *infra*.

(criticizing "the conclusory ('even if') analysis engaged in by the district court"), *cert. denied*, 114 S. Ct. 779 (1994). *See also Clark v. Calhoun County*, 21 F.3d 92, 97 (5th Cir. 1994) (reversing and remanding district court decision which erroneously addressed *Gingles* factors, despite district court's statement that it would have ruled against plaintiffs under totality of circumstances even if plaintiffs had satisfied *Gingles* factors).

Similarly, under the *Shaw* jurisprudence, a district court's inquiry does not end when it finds that race predominated in the redistricting process. This Court's *Shaw* jurisprudence requires a court to assess whether there was a compelling justification for a plan drawn with race as a predominant factor, and whether the plan was narrowly tailored to serve that justification. *See, e.g., Shaw v. Hunt*, 517 U.S. at 914 (assuming without argument that "§ 2 could be a compelling interest"); *Miller*, 515 U.S. at 915 (race-consciousness in drawing district lines would not alone render a districting plan presumptively unconstitutional). The lower court erred by discontinuing its inquiry once it concluded that race predominated in the creation of the Twelfth District.

The trial record indicates that, in creating the plan, the legislature was aware of North Carolina's long history of official discrimination against African-Americans and their exclusion from the political process due to state and private action. In addition, plaintiffs stipulated to this history and its lingering effects. *See* NC. J.S. app. at 34a. Moreover, there was evidence that the State sought to "provid[e] minority voters a fair opportunity to elect representatives of their choice in at least two districts (Districts 1 and 12)," Jt. App. at 384, and that the Twelfth District does afford African-American voters a fair

chance to elect their candidate of choice. *See* Jt. App. at 386. The district court erred in not engaging in the rigorous strict scrutiny inquiry required by this Court.

III. The District Court Erred in Ordering Redistricting on the Eve of the Post-2000 Census Redistricting Cycle

Despite the urgency of the State's election schedule, the district court failed to issue its discovery schedule until August 23, 1999, three months after this Court's prior decision in this case. Although the district court was aware that the State's election process had begun, it nevertheless delayed over three months after an expedited trial to issue its opinion. In the time that the trial court took to issue its opinion, the State's election process was fully engaged. Any remedy in this case that requires redistricting threatens to disrupt the on-going election process, perhaps requiring new primary and general elections. Appellees have indicated clearly that they will seek just such a remedy. *See, e.g.*, Appellees' Motion to Expedite Schedule for Appeal. The injury from disrupting election processes is significant and has been well documented by this Court and the federal trial courts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964).[17] Moreover, the injury to minority voters which would

---

[17]These principles have guided federal trial courts in both reapportionment and vote dilution cases. *See, e.g., Diaz v. Silver*, 932 F. Supp. 462, 466 (E.D.N.Y. 1996) (preliminary injunction denied to avoid harming public interest where elections scheduled in a few months, even though court found likelihood of success on *Shaw* claim and irreparable injury to plaintiffs); *Cardona v. Oakland Unified School District*, 785 F. Supp. 837, 843 (N.D. Cal. 1992) (court refused to enjoin election where primary "election machinery is already in gear," including the passage of deadline for candidates to establish residency and start of candidate

result from disruption of the election schedule in this case is especially grave. *See* Smallwood Appellants' Application to Stay Decision of the United States District Court for the Eastern District of North Carolina Pending Appeal at 2-6.[18] *See also Reynolds*, quoted *supra*, 377 U.S. at 585 ("[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid"). *See also Watkins v. Mabus*, 502 U.S. 954 (1991); *Republican Party of Shelby County v. Dixon*, 429 U.S. 934 (1976); *Ely v. Klahr*, 403 U.S. 108 (1971).

---

nominating period); *Republican Party of Virginia v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991) (injunction denied in case with "uncertain cause of action with only possible irreparable harm" and where time for election was close and there was danger of low voter turnout if election postponed); *Cosner v. Dalton*, 522 F. Supp. 350 (E.D. Va. 1981) (three-judge court) (use of malapportioned plan not enjoined where elections were two months away); *Shapiro v. Maryland*, 336 F. Supp. 1205 (D. Md. 1972) (court refused to enjoin election where candidate filing deadline was imminent and granting relief would disrupt election process and prejudice citizens, candidates and state officials); *Sincock v. Roman*, 233 F. Supp. 615 (D. Del. 1964) (three-judge court) (*per curiam*) (enjoining election would result in disruption in ongoing election process which would cause confusion and possible disenfranchisement of voters); *Meeks v. Anderson*, 229 F. Supp. 271, 274 (D. Kan. 1964) (three-judge court) (court held malapportioned districts unconstitutional but concluded that the "ends of justice" would "best be served" by permitting elections to proceed).

[18] The harms that could result from such disruption prompted the three-judge district court in the earlier litigation in *Shaw v. Hunt* litigation to deny injunctive relief to plaintiffs in 1996, where only a few months remained before the general election.

Moreover, in less than one year, the Census Bureau will release the 2000 Census data and the State will begin the redistricting process anew, a process that inevitably will result in at least some Congressional districts being redrawn. To require the State to engage in the disruptive process now only to repeat it in less than a year would be unduly burdensome and duplicative. *Cf. Maxwell v. Foster*, No. 98-1378, (W.D. La. Nov. 24, 1999) (district court granting State of Louisiana's motion for summary judgment and finding that "rapid-fire reapportionment immediately prior to a scheduled census would constitute an undue disruption of the election process, the stability and continuity of the legislative system and would be highly prejudicial, not only to the citizens of Louisiana, but to the state itself"), attached to the Smallwood Appellants' Application to Stay Decision of the United States District Court for the Eastern District of North Carolina Pending Appeal as Appendix E. Accordingly, courts have repeatedly upheld district court decisions to either deny claims brought in close proximity to the decennial census or permit elections to be held under plans deemed unconstitutional when the release of new decennial census data will inevitably result in the creation of a new redistricting plan. *See, e.g., Ely*, 403 U.S. at 114-115 (affirming district court decision to permit elections to proceed under plan held to be unconstitutional when release of 1970 census data would result in creation of new reapportionment plan); *White v. Daniel*, 909 F.2d 99, 103 (4th Cir. 1990) ("A challenge to a reapportionment plan close to the time of a new census, which may require reapportionment, is not favored"); *Maryland Citizens for a Representative Gen. Assembly v. Governor of Maryland*, 429 F.2d 606, 610 (4th Cir. 1970) (challenge to apportionment plan dismissed because potentially

would require creation of remedial plan in close proximity to release of census data and next redistricting).[19]

In *Ely*, this Court held that a district court did not err in allowing elections to proceed under a plan determined to be unconstitutional because redistricting based on decennial census data was imminent. *Ely*, 403 U.S. at 114. In that case, plaintiffs challenged the constitutionality of Arizona's state legislative districts. *Id.* at 111. After several attempts by the legislature to enact a constitutionally valid plan, the district court ordered that the state conduct the next elections under the unconstitutional plan, reasoning that another plan could not be created without delaying the primary elections. *Id.* at 113. In affirming the district court decision, this Court relied on the fact that the next census would result in the creation of a new reapportionment plan drawn according to the new decennial census data. *Id.* at 114-115.

As the next redistricting cycle is imminent, if this Court were to affirm the decision below, allowing the state to proceed with elections under the 1997 Remedial Plan would not permanently prevent plaintiffs from acquiring the remedy they seek: a new redistricting plan. If appellees are not satisfied with the new plan, they may seek to modify it through participation in the political process or challenge its constitutionality subsequently. The reasoning of the Seventh

---

[19]In making its ruling in *Maryland Citizens*, the Fourth Circuit compared the facts in that case to those in *Chavis v. Whitcomb*, 396 U.S. 1064 (1970) in which this Court granted a stay, permitting elections to proceed under a plan held to be unconstitutional. The Fourth Circuit panel reasoned, "If relief was appropriately withheld in *Chavis*, *a fortiori*, it must be withheld in this case." *Maryland Citizens*, 429 F. 2d at 611.

Circuit decision in *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 502 (7th Cir. 1991) is directly on point:

> The district court also concluded that, on equitable grounds, the pending 1991 redistricting (based on the 1990 census) makes entry of relief inappropriate. The district court did not err in making this finding. The legislative reapportionment is imminent, and Districts 49 and 51 may well be reshuffled. The legislature should now complete its duty, after which the plaintiffs can reassess whether racial bias still exists and seek appropriate relief.

This is consistent with the most recent decisions of district courts that have considered constitutional challenges to redistricting plans late in the decade. *See, e.g., Maxwell v. Foster*, *supra*. p. 33.

Therefore, the district court ruling ordering redistricting and new elections should be reversed. Furthermore, even if this Court should hold the Twelfth District unconstitutional, rather than requiring the State to engage in a disruptive redistricting process that will invariably produce districts drawn according to inaccurate data, this Court should act consistent with well-established precedent to not order a new election as part of any remedy, permitting the State to proceed with the 2000 elections under the 1997 Remedial Plan or allowing those results to stand should the elections be held before the final disposition of this case before this Court.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and enter judgment for appellants.

Respectfully submitted,

ELAINE R. JONES
Director-Counsel
NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, NY 10013
(212) 965-2200

TODD A. COX*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 Eye Street, NW
10th Floor
Washington, DC 20005
(202) 682-1300

ADAM STEIN
FERGUSON, STEIN, WALLAS,
ADKINS, GRESHAM &
SUMTER, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

**Counsel of Record*

Attorneys for Smallwood Appellants

Supreme Court, U.S.
FILED
SEP - 8 2000
CLERK

Nos. 99-1864 and 99-1865

In the Supreme Court of the United States

JAMES B. HUNT, JR., GOVERNOR OF NORTH CAROLINA, ET AL., APPELLANTS

v.

MARTIN CROMARTIE, ET AL.

ALFRED SMALLWOOD, ET AL., APPELLANTS

v.

MARTIN CROMARTIE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

SETH P. WAXMAN
Solicitor General
Counsel of Record

WILLIAM R. YEOMANS
Acting Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

DAVID K. FLYNN
LOUIS E. PERAERTZ
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

35

QUESTION PRESENTED

The United States will address the following question:

Whether the district court applied the correct legal standards in finding that race was the predominant factor in the drawing of District 12 of North Carolina's 1997 congressional redistricting plan.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	8
Argument:	
I. The predominant factor test requires a district court to engage in a particularly sensitive inquiry into a State's intent in drawing a district, and it requires proof not merely that race was a factor in drawing a district, but that it was the predominant factor	11
A. A *Shaw* claim requires proof that race was the State's "predominant factor"	11
B. The predominant factor test is a demanding one	12
II. The district court improperly inferred a predominant racial motive in this case	16
A. The district court relied substantially on evidence that was incompetent to distinguish between race and politics as a factor in District 12	18
B. It was clear error for the district court to infer predominant racial motive from Dr. Weber's testimony	21
C. The district court's conclusions from other testimony were infected by its earlier errors and in any event confuse evidence that race was *a* factor in drawing District 12 with evidence that it was the *predominant* factor	26
Conclusion	30

TABLE OF AUTHORITIES

Cases:	Page
Abrams v. *Johnson*, 521 U.S. 74 (1997)	13
Anderson v. *City of Bessemer City*, 470 U.S. 564 (1985)	24
Buckanaga v. *Sisseton Indep. School Dist.*, 804 F.2d 469 (8th Cir. 1986)	23
Bush v. *Vera*, 517 U.S. 952 (1996)	11-12, 14, 15, 16, 18, 20, 28, 29
Chapman v. *Meier*, 420 U.S. 1 (1975)	13
Clark v. *Calhoun County*, 21 F.3d 92 (5th Cir. 1994)	23-24
Commissioner v. *Duberstein*, 363 U.S. 278 (1960)	23
Cousin v. *McWherter*, 46 F.3d 568 (6th Cir. 1995)	23
Growe v. *Emison*, 507 U.S. 25 (1993)	13
Harvell v. *Ladd*, 958 F.2d 226 (8th Cir. 1992)	23
Hunt v. *Cromartie*, 526 U.S. 541 (1999)	2, 3-4, 11, 16, 19, 20
Johnson v. *Hamrick*, 196 F.3d 1216 (11th Cir. 1999)	23
Lawyer v. *Department of Justice*, 521 U.S. 567 (1997)	11, 12, 17
Lee County Branch of the NAACP v. *City of Opelika*, 748 F.2d 1473 (11th Cir. 1984)	23
Miller v. *Johnson*, 515 U.S. 900 (1995)	12, 13-14
Shaw v. *Hunt*, 517 U.S. 899 (1996)	2, 11, 13, 15, 28, 29
Shaw v. *Reno*, 509 U.S. 630 (1993)	2, 11, 13, 28
Uno v. *City of Holyoke*, 72 F.3d 973 (1st Cir. 1995)	23
Velasquez v. *City of Abilene*, 725 F.2d 1017 (5th Cir. 1984)	23, 24
Village of Arlington Heights v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977)	12

Cases—Continued:	Page
Westwego Citizens for Better Gov't v. *City of Westwego*, 872 F.2d 1201 (5th Cir. 1989)	23
Wise v. *Lipscomb*, 437 U.S. 535 (1978)	12
Constitution, statute and rule:	
U.S. Const. Amend. XIV (Equal Protection Clause)	1, 2, 11
Voting Rights Act of 1965, 42 U.S.C. 1971 *et seq.*:	
§ 2, 42 U.S.C. 1973	1
§ 5, 42 U.S.C. 1973c	1
Fed. R. Civ. P. 52(a)	23
Miscellaneous:	
The Almanac of American Politics 1998 (1997)	19

In the Supreme Court of the United States

No. 99-1864

JAMES B. HUNT, JR., GOVERNOR OF NORTH CAROLINA, ET AL., APPELLANTS

v.

MARTIN CROMARTIE, ET AL.

No. 99-1865

ALFRED SMALLWOOD, ET AL., APPELLANTS

v.

MARTIN CROMARTIE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF THE UNITED STATES

This case concerns a district court's finding that a state election districting plan was drawn predominantly on the basis of race, in violation of the Equal Protection Clause of the Fourteenth Amendment. The United States enforces Sections 2 and 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973, 1973c), which require, in part, that States and political subdivisions not engage in voting practices that deny citizens an equal opportunity to elect representatives of their choice on account of their race. Those statutes sometimes require States to take the racial consequences of their districting decisions into account. The United States has an interest in ensuring that States have reasonable leeway to

design districts that comply with both the Voting Rights Act and the Equal Protection Clause. The United States has participated in all three prior appeals in related litigation. The United States was a party-defendant in *Shaw* v. *Reno*, 509 U.S. 630 (1993), and filed briefs as *amicus curiae* in *Shaw* v. *Hunt*, 517 U.S. 899 (1996), and in *Hunt* v. *Cromartie*, 526 U.S. 541 (1999).

STATEMENT

1. In *Shaw* v. *Hunt*, 517 U.S. 899 (1996) (*Shaw II*), this Court struck down North Carolina's 1992 congressional districting plan under the Equal Protection Clause of the Fourteenth Amendment. The Court held that District 12 in that plan had been drawn predominantly on the basis of race, *id.* at 907, and that it did not satisfy strict scrutiny, *id.* at 910-918.

After this Court's decision, the North Carolina General Assembly attempted to enact a new districting plan. The state Senate had a Democratic majority and the House had a Republican majority. State Senator Roy A. Cooper, III, and State Representative W. Edwin McMahan, the chairmen of the Senate and House redistricting committees, provided affidavits and testimony detailing the goals and purposes of the committees. J.S. App. 81a-87a; J.A. 179-230 (Cooper); J.S. App. 137a-154a; J.A. 231-244 (McMahan). Among the avowed goals of the committees were "curing the constitutional defects of the 1992 Plan by assuring that race was not the predominant factor in the new plan" and "drawing the plan to maintain the existing partisan balance." J.S. App. 11a. To achieve that partisan goal, "the redistricting committees drew the new plan (1) to avoid placing two incumbents in the same district and (2) to preserve the partisan core of the existing districts to the extent consistent with the goal of curing the defects in the old plan." *Ibid.*

District 12 in the 1997 Plan is different from the district found unconstitutional in *Shaw II* in important respects. As

this Court noted in its prior decision in this case, *Hunt* v. *Cromartie* (*Hunt I*), 526 U.S. 541, 544 (1999), District 12 splits six counties, as opposed to ten in the unconstitutional plan. The distance between its farthest points has been reduced from 160 miles to 95 miles. *Ibid.* African-Americans are no longer a majority in the district, constituting approximately 43% of its voting age population, 46% of registered voters, and 47% of its population. *Ibid.* District 12 is also fully contiguous and, unlike the unconstitutional District 12 in the 1992 plan, it does not employ artificial devices such as "crossovers" to achieve contiguity. J.S. App. 83a.

The 1997 Plan was enacted by the legislature on March 31, 1997, despite an earlier belief by many that the party division between the two houses of the legislature would make such agreement impossible. J.S. App. 2a, 82a, 138a; J.A. 240. Twelve of the 17 African-American members of North Carolina's House of Representatives voted against the plan. J.S. App. 140a.

2. a. Appellees filed an amended complaint alleging that District 12 under the 1997 Plan is, like its predecessor, an unconstitutional gerrymander. See *Hunt I*, 526 U.S. at 544. The parties filed competing motions for summary judgment and, in April 1998, the district court, by a 2-1 majority, granted appellees' motion. *Id.* at 545; see J.S. App. 243a-282a.

b. On May 17, 1999, this Court in *Hunt I* unanimously reversed the order granting summary judgment to appellees. The Court noted that "[t]he task of assessing a jurisdiction's motivation * * * is an inherently complex endeavor" and that it "requir[es] the trial court to perform a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 526 U.S. at 546 (citation omitted). Assessing the summary judgment record, the Court noted that appellees had offered "circumstantial" evidence consisting of geographic and demographic data, *id.* at 547, which, "[v]iewed in toto, * * * tends to support an

inference that the State drew its district lines with an impermissible racial motive—even though they presented no direct evidence of intent." *Id.* at 548-549. The Court also noted, however, that appellants had produced testimony by the legislators who drew the plan that their intent was "to make District 12 a strong Democratic district," and what the Court described as "[m]ore important" expert testimony examining the demographics and the entire boundary of the district. *Id.* at 549. That testimony tended to show "a high correlation between race and party preference," *id.* at 552, because "in precincts with high black representation, there is a correspondingly high tendency for voters to favor the Democratic Party" and vice versa, *id.* at 550. The expert, Dr. David W. Peterson, concluded that "the data as a whole supported a political explanation at least as well as, and somewhat better than, a racial explanation" for the configuration of District 12. *Ibid.*

The Court noted that a political explanation for District 12 would make the district constitutional, since "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact." 526 U.S. at 551. To reject that political explanation, the district court had necessarily "either credited appellees' asserted inferences over those advanced and supported by appellants or did not give appellants the inference they were due." *Id.* at 552. In either event, "it was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgment stage." *Ibid.*

3. On remand, the three-judge district court held a three-day trial. On March 7, 2000, the court ruled by a 2-1 margin that District 12 "continues to be unconstitutional." J.S. App. 35a.

a. The majority initially repeated, virtually verbatim, many of the same facts regarding the racial composition, party registration, and statistical measures of compactness

that it had relied on in granting summary judgment to appellees. That evidence tended to show that cities and counties were divided such that the portions within District 12 had substantially higher percentages of African-Americans than the portions outside District 12, see J.S. App. 12a-14a, and that the boundary of District 12 excluded certain precincts in which 54-69% of the voters had registered as Democrats, see *id.* at 13a-14a. It also showed that District 12 scored relatively low on statistical measures of compactness. *Id.* at 15a-17a. Compare J.S. App. 247a-253a (district court opinion at summary judgment stage).

The majority also referred to evidence presented by plaintiffs' expert, Dr. Ronald Weber. According to the court, Dr. Weber "showed time and again how race trumped party affiliation in the construction of the 12th District and how political explanations utterly failed to explain the composition of the district." J.S. App. 26a. The majority also stated that Dr. Weber had "presented a convincing critique" of the "boundary segment" analysis presented by the State's expert, Dr. David Peterson, and discussed by this Court in its opinion in *Hunt I*, and that Dr. Weber had found that Dr. Peterson's study "'has not been appropriately done,' and was therefore 'unreliable' and not relevant." *Id.* at 27a. The majority did not itself specify the particular respects in which Dr. Peterson's analysis was deficient.

The majority finally referred to two other items of evidence to support its conclusion that race, and not politics, was the predominant factor underlying the creation of District 12. First, the majority referred to the testimony of Senator Cooper. The majority stated that "[t]he conclusion that race predominated was * * * bolstered by" an allusion by Senator Cooper to a desire to achieve "racial and partisan balance" as factors underlying the redistricting plan. J.S. App. 27a. The majority found "simply not credible" Senator Cooper's contention that "he did not mean the term 'racial balance' to refer to the maintenance of a ten-two balance be-

tween whites and African-Americans." *Ibid.* Second, the court referred to an e-mail to Senator Cooper that had been written by Gerry Cohen, the legislative employee who had been responsible for technical aspects of drawing the 1997 and earlier state plans. See *id.* at 8a. The e-mail discussed the racial composition of a different district—District 1—and then added that "I [Cohen] have moved Greensboro Black community into the 12th, and now need to take [a]bout 60,000 out of the 12th. I await your direction on this." *Ibid.*; see J.A. 369 (full text of e-mail). The majority stated that the e-mail "clearly demonstrates that the chief architects of the 1997 Plan had evolved a methodology for segregating voters by race, and that they had applied this method to the 12th District." J.S. App. 27a.

The majority concluded that the legislature had "eschewed traditional districting criteria such as contiguity, geographical integrity, community of interest, and compactness in redrawing the District," but instead had "utilized race as the predominant factor in drawing the District." J.S. App. 29a. The court entered an injunction against use of District 12 in this year's elections. *Id.* at 35a.[1]

b. Judge Thornburg dissented from the panel's holding that District 12 is an unconstitutional racial gerrymander. J.S. App. 37a-68a. In his view, appellees—who had the burden of proving that race was the predominant factor—had "failed to carry their burden through either direct or circumstantial evidence." *Id.* at 45a. He stated that the State had "produced ample and convincing evidence which

[1] The district court also held that District 1 was subject to strict scrutiny, but it found that the State had satisfied that standard. J.S. App. 30a-35a. Appellees did not perfect their appeal from that ruling, and the district court granted appellants' motion to dismiss appellees' appeal on August 3, 2000 (Docket No. 178). Accordingly, although the district court's ruling that District 12 is unconstitutional is now before this Court, the district court's ruling that District 1 is constitutional is no longer at issue, and will not be further addressed herein.

demonstrates that political concerns such as existing constituents, incumbency, voter performance, commonality of interests, and contiguity, not racial motivations, dominated the process surrounding the creation and adoption of the 1997 redistricting plan." *Id.* at 45a-46a. He noted that the 1997 Plan's drafters "recognized the necessity of creating a plan which would garner the support of both parties and both houses" by "protect[ing] incumbents and thereby maintain[ing] the then existing 6-6 partisan split amongst North Carolina's congressional delegation." *Id.* at 46a. Since District 12 had a Democratic incumbent, "common sense as well as political experience dictated ascertaining the strongest voter performing Democratic precincts in the urban Piedmont Crescent." *Id.* at 47a. The fact "[t]hat many of those strong Democratic performing precincts were majority African-American, and that the General Assembly leaders were aware of that fact, is not a constitutional violation." *Ibid.*

Judge Thornburg addressed Dr. Weber's testimony that District 12 was drawn on a predominantly racial, and not political, basis, because the District failed to include some Democratic precincts that had relatively low African-American populations. Judge Thornburg noted that "there is no dispute that every one of the majority African-American precincts included in the Twelfth District are among the highest, if not the highest, Democratic performing districts in that geographic region." J.S. App. 50a. He noted that to include other well-performing Democratic precincts identified by Dr. Weber would have meant excluding "the *highest* performing Democratic precincts." *Ibid.* He also explained that "few of the strong Democratic precincts to which Dr. Weber referred could have easily been included in the Twelfth District" because few of them "actually abutted" the District. *Id.* at 50a n.21. Judge Thornburg also noted Dr. Weber's testimony that he had "considered no hypothesis other than race as the legislature's predominant motive" be-

cause he had believed, mistakenly, "that the person drawing North Carolina's districts could only see racial data" on his computer screen. *Id.* at 51a. Finally, Judge Thornburg noted that Dr. Weber had also "specifically failed to inquire about real world political or partisan factors which might have influenced the process." *Ibid.*

With respect to the Cooper-Cohen e-mail, Judge Thornburg explained that it "does little more than reinforce what is already known, and what is not constitutionally impermissible: North Carolina's legislative leaders were conscious of race, aware of racial percentages, on notice of the potential constitutional implications of their actions, and generally very concerned with these and every other political and partisan consideration which affected whether or not the redistricting plan would pass." J.S. App. 48a n.18. Those facts "contribute little to [appellees'] efforts to show that racial motives *predominated*." *Ibid.*

4. On March 16, 2000, this Court entered an order staying the district court's injunction. 120 S. Ct. 1415.

SUMMARY OF ARGUMENT

This case presents the Court with what is likely to be its final opportunity to clarify the legal standards governing a racial gerrymandering claim before state legislatures begin the redistricting process triggered by the decennial census. Both in the *Shaw* context and elsewhere, this Court has frequently emphasized the extraordinary sensitivity of redistricting and high costs of unnecessary federal court intrusion into the primary authority of the States in this area. For those reasons, it is crucial that the "predominant factor" test that governs a racial gerrymandering claim not be interpreted to give district courts a free-ranging license to substitute their judgments for those of state legislatures in the quintessentially political determination of how appropriately to draw electoral districts.

This Court's decisions have established that a district is subject to strict scrutiny when it is drawn with race as the predominant factor; the plaintiff must prove that traditional race-neutral districting principles were subordinated to race—not to some other factor—before strict scrutiny applies. As the Court has repeatedly explained, the "predominant factor" test is a demanding one. It does not license a district court to intrude in the core state function of redistricting merely because the State has drawn a district that is majority-minority or that has a higher minority population than neighboring districts. Nor does it permit a district court to intrude in state redistricting merely because racial considerations were *a* factor among others in drawing a particular district or in making some of the subsidiary districting decisions that go into a districting plan. Rather, a district court may intrude in districting in this context only if the State's dominant and controlling rationale was race.

Under that standard, the district court in this case erred in concluding that the predominant factor in drawing District 12 was racial. First, the district court relied substantially on evidence that was incompetent to distinguish between race and politics as a factor responsible for the configuration of District 12. The crucial and uncontroverted fact is that in North Carolina African-Americans reliably vote overwhelmingly—90% or more—for Democratic candidates. Accordingly, any district that, like District 12, is drawn to concentrate reliable Democratic voters will tend as well to concentrate African-American voters. The evidence on which the district court relied that District 12 is unusually shaped in a way that tends to correspond with race thus tends only to frame the question—whether the district was drawn with race or political motives as predominant—but not to answer it. The district court also relied on evidence showing that District 12 fails to include some precincts with high Democratic registration figures. But in a State like North Carolina, in which registered Democrats frequently

vote Republican, that evidence is entirely consistent with the legislature's professed desire to create a district that would be solidly Democratic on election day, and it provides no basis for doubting the State's professed political motive.

Second, the district court committed clear error in inferring from certain evidence presented by appellees' expert, Dr. Ronald Weber, that race was the predominant motive underlying District 12. For example, the district court relied on Dr. Weber's testimony that precincts that had voted for Democratic candidates in past elections were omitted from District 12. The evidence on which the court relied would have been sufficient to tend to disprove the State's partisan objective of creating District 12 as a solidly Democratic district only if appellees had shown that including the omitted precincts would have resulted in a District 12 with a higher overall Democratic voting strength. Omitting precincts with Democratic voting patterns in favor of precincts with even more solidly Democratic voting patterns is entirely consistent with the State's professed objective. It cannot support an inference of predominant racial motive.

Third, the district court, based in large part on the faulty inferences discussed above, inferred a predominant racial motive from statements by Senator Cooper and legislative employee Gerry Cohen. Insofar as the district court's inferences in this regard were based on its earlier errors, the court's conclusions should be disregarded. In any event, however, the inferences the district court drew from these statements showed at most that race was *a* factor underlying District 12. The district court thus failed to distinguish between a State's mere desire to achieve a racial objective in districting as one factor among others and the desire to achieve a racial objective as a predominant motive underlying District 12; only the latter is subject to strict scrutiny. Where there is as close a coincidence of race and politics as in this case, a district court may not conclude that race was the predominant factor based solely on isolated findings that

in particular respects the process or result of the State's districting shows that the State was aware of the racial consequences of its actions or that race was a factor; to do so would leave States that engaged in entirely constitutional districting at risk of a district court's inference that, because they had some racial knowledge or motivation, it must have been predominant.

ARGUMENT

I. THE PREDOMINANT FACTOR TEST REQUIRES A DISTRICT COURT TO ENGAGE IN A PARTICULARLY SENSITIVE INQUIRY INTO A STATE'S INTENT IN DRAWING A DISTRICT, AND IT REQUIRES PROOF NOT MERELY THAT RACE WAS A FACTOR IN DRAWING A DISTRICT, BUT THAT IT WAS THE PREDOMINANT FACTOR

A. A *Shaw* Claim Requires Proof That Race Was The State's "Predominant Factor"

In *Shaw* v. *Reno*, 509 U.S. 630 (1993) (*Shaw I*), this Court first recognized a claim for racial gerrymandering in violation of the Equal Protection Clause. In *Miller* v. *Johnson*, 515 U.S. 900 (1995), the Court articulated the governing standard: strict scrutiny is triggered only when "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* at 913. Race must thus be shown to be "*the predominant* factor motivating the legislature's [redistricting] decision." *Bush* v. *Vera*, 517 U.S. 952, 959 (1996) (plurality opinion) (emphasis in original); see also *Shaw* v. *Hunt*, 517 U.S. 899, 905 (1996) (*Shaw II*); *Lawyer* v. *Department of Justice*, 521 U.S. 567, 582 (1997); *Hunt* v. *Cromartie*, 526 U.S. 541, 547 (1999) (*Hunt I*).

The "predominant factor" test is not the same inquiry applicable "in cases of 'classifications based explicitly on

race,'" *Bush*, 517 U.S. at 958, or in cases in which facially neutral practices are challenged on the ground that race is a "motivating factor in the decision," *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). A necessary consequence of the Court's holding that a district is subject to strict scrutiny only when race was the State's "predominant factor" in drawing it is that a *Shaw* claim is not made out when race is merely one of the motives or factors considered—but not the predominant one—in drawing the district. Indeed, the plurality in *Bush* made that point expressly, rejecting the view "that it suffices [in making out a *Shaw* claim] that racial considerations be *a* motivation for the drawing of a majority-minority district." *Bush*, 517 U.S. at 959 (emphasis in original). In short, "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race," *id.* at 958, "[n]or * * * is the decision to create a majority-minority district objectionable in and of itself," *id.* at 962. As Justice O'Connor has explained, under the "predominant factor" test, "States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny." *Id.* at 993 (O'Connor, J., concurring).

B. The Predominant Factor Test Is A Demanding One

1. This Court has frequently noted, both in *Shaw* cases and in other redistricting cases, that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise* v. *Lipscomb*, 437 U.S. 535, 539 (1978). Of course, federal courts serve a "customary and appropriate backstop role," *Bush*, 517 U.S. at 985, when a state redistricting plan "runs afoul of federal law," *Lawyer*, 521 U.S. at 577. But because "reapportionment is primarily the duty and responsibility of the State," *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975), and is "a most difficult subject for legislatures," *Miller*, 515

U.S. at 915, "the States must have discretion to exercise the political judgment necessary to balance competing interests," *ibid.* "The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies." *Abrams* v. *Johnson*, 521 U.S. 74, 101 (1997). See also *Growe* v. *Emison*, 507 U.S. 25, 34 (1993). Because of the serious consequences of federal judicial intrusion into this most sensitive of state legislative tasks, "[t]he courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, 515 U.S. at 915-916. See also *id.* at 916 ("[T]he sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments * * * requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race."); *id.* at 915 ("the good faith of a state legislature must be presumed").

2. The extraordinary sensitivity of the redistricting process, coupled with the high costs of undue federal court intrusion into that process, demands that a district court scrupulously observe the substantive requirements of the "predominant factor" test before finding a *Shaw* violation. In some cases, of course, "[t]he evidentiary inquiry is . . . relatively easy." *Miller*, 515 U.S. at 913. For example, "[i]n some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." *Shaw I*, 509 U.S. at 646-647. Similarly, the redistricting record or the subsequent litigation may disclose the relevant State officials making clear that their "*overriding* purpose was * * * to create * * * congressional districts with effective black voting majorities." *Shaw II*, 517 U.S. at 906; *Miller*, 515 U.S. at 918 (State was "driven by its overriding desire to comply with

[racial] maximization demands"). These are mere examples; other facts can also demonstrate that race was the predominant factor in a particular case.

In other cases, it cannot so readily be inferred that race was the predominant factor. For example, when (as is true in this case) race correlates highly with partisan voting behavior, it is predictable that a State that wants to create a district whose borders tend to concentrate members of a particular political party will, as a byproduct, create a district whose borders tend to concentrate members of a particular race. If that alone were sufficient to support a finding that strict scrutiny applies (and that the district is unconstitutional absent a compelling interest), a State would have to forego its otherwise lawful option of forming districts on the basis of partisan choices. Indeed, it would have to do so only in one category of cases—where race correlates highly with partisan voting behavior. That contravenes the settled principles that "incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' [is] a legitimate state goal," and that "political gerrymandering" should not be subjected to strict scrutiny. *Bush*, 517 U.S. at 964.[2]

Even if the State has taken race into account to some extent in drawing the district in such a case, that is still not sufficient to show that the "predominant factor" underlying the district is racial. As discussed above, strict scrutiny is not triggered where race is merely "*a* motivation," *Bush*, 517 U.S. at 959, in drawing a district; a *Shaw* claim requires proof that race was the *predominant* factor. Therefore,

[2] See *Bush*, 517 U.S. at 968 ("If the State's goal is otherwise constitutional political gerrymandering, it is free to use * * * political data * * * —precinct general election voting patterns, precinct primary voting patterns, and legislators' experience—to achieve that goal regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district.") (citations omitted).

where race and partisan voting behavior correlate highly, and a State draws a district with mixed political, racial, and other motivations, a district court may not merely seize on isolated evidence tending to show the State's racial motivation in drawing the district to conclude that race was the predominant factor. To permit that inference would paradoxically hamstring state legislatures in achieving their political objectives in any State where race correlates highly with partisan voting behavior. For even if a legislature paid no attention whatever to race, its politically motivated districting decisions would likely be susceptible to a racial interpretation. And if the State exercised its lawful authority to take race into account to some extent, it would inevitably risk the finding of predominant racial motive that was made here. That result would be inconsistent with bedrock principles recognizing that state legislatures—and not federal courts—have primary responsibility for the politically highly charged task of drawing districts, and that federal courts must be particularly cautious before intruding into state prerogatives in this area. To trigger strict scrutiny, the party challenging the district must satisfy the heavy burden of proving that "[r]ace was the criterion that, in the State's view, could not be compromised." *Shaw II*, 517 U.S. at 907.

Bush v. *Vera* illustrates these principles. The plurality in *Bush* initially noted findings "that the State substantially neglected traditional districting criteria such as compactness, that it was committed from the outset to creating majority-minority districts, and that it manipulated district lines to exploit unprecedentedly detailed racial data." 517 U.S. at 962. The plurality stated, however, merely that those factors "together weigh in favor of the application of strict scrutiny"—not that they required its application. *Ibid.* The plurality explained that it must therefore "consider what role other factors played in order to determine whether race predominated." *Id.* at 963. As the plurality explained,

"[b]ecause it is clear that race was not the only factor that motivated the legislature to draw irregular district lines, we must scrutinize each challenged district to determine whether the District Court's conclusion that race predominated over legitimate districting considerations, including incumbency, can be sustained." *Id.* at 965. Only after concluding that there was exceptionally strong evidence sufficient to show not merely that race was a factor, but that it was the *predominant* factor, did the plurality determine that the districts in question should be subject to strict scrutiny.[3] The same inquiry was required here.

II. THE DISTRICT COURT IMPROPERLY INFERRED A PREDOMINANT RACIAL MOTIVE IN THIS CASE

As this Court noted in its decision in *Hunt I*, the lines of District 12 correlate highly with race. District 12 contains portions of six counties; in each of them, the portion of the county within District 12 has a substantially higher African-American population than does the portion of the county outside District 12. See *Hunt I*, 526 U.S. at 548 & n.4. Moreover, the boundary lines of District 12 are irregular in shape. See *id.* at 547-548. Plaintiffs' claim has always been

[3] See *Bush*, 517 U.S. at 969 (evidence that the State itself explained the district "in exclusively racial terms"), 970 (evidence that "districting software * * * provided only racial data at the block-by-block level," and that district lines were in fact determined at that level), 970 (evidence of use of "race as a proxy"), 971 (evidence that shape of district was "far from the shape that would be necessary to maximize the Democratic vote in that area"), 972-973 ("intensive and pervasive use of race both as a proxy to protect the political fortunes of adjacent incumbents, and for its own sake in maximizing the minority population of District 30 regardless of traditional districting principles"), 975 ("racial demographics and voting patterns * * * belie[] any suggestion that party politics could explain" two adjoining districts, because "[t]he district lines correlate almost perfectly with race, while both districts are similarly solidly Democratic") (citation omitted).

that this evidence demonstrated that District 12 was an unconstitutional racial gerrymander.

As the Court explained in *Hunt I*, however, the State advanced a different explanation for the lines of District 12. At the time of the 1997 Plan, the North Carolina legislature was divided between Republicans and Democrats, with the Republicans in control of the House and the Democrats in control of the Senate. Similarly, the State's congressional delegation was evenly divided between six Democrats and six Republicans. The State contended that the legislators in charge of redistricting concluded that, in this situation, the only way to get a redistricting plan through the legislature would be to adopt a plan that maintained the six-six partisan split in the congressional delegation and that protected all of the incumbents. See J.S. App. 82a-83a, 138a-139a; J.A. 180-182, 235, 240-241. Because District 12 had a Democratic incumbent, the result was to craft District 12 in such a way as to solidify the Democratic vote there. Further, it is undisputed that 90% or more of African-Americans in North Carolina regularly vote Democratic. See, *e.g.*, J.A. 130 ("over 90 percent" in a series of studies); J.A. 139 ("95 to 97 percent"). Accordingly, the State contended that the correlation between the district lines and race was a mere by-product of the State's desire to create a solidly Democratic District 12; the result of the State's attempt to concentrate Democratic voters in the district was that the most reliable Democratic voters—African-Americans—tended to be included.[4]

[4] It is also significant that District 12—with a 43% African-American voting age population and a 47% total African-American population—is not a majority-minority district. As the Court explained in *Lawyer*, "[t]he fact that [the challenged district] is not a majority black district * * * supports the * * * finding that the district is not a 'safe' one for black-preferred candidates, but one that offers to any candidate, without regard to race, the opportunity to seek and be elected to office." 521 U.S. at 581 (internal quotation marks omitted).

In short, this was a "mixed motive" case, like *Bush* v. *Vera*. See 517 U.S. at 959. On remand, what remained for the district court was to determine whether plaintiffs could carry their burden at trial of proving that, as between the two motives, race—and not the kinds of partisan considerations urged by the State—was the predominant factor underlying the District. The district court's conclusion that plaintiffs had carried that burden was fatally defective, for three reasons.

A. The District Court Relied Substantially On Evidence That Was Incompetent To Distinguish Between Race And Politics As A Factor In Drawing District 12

Much of the district court's opinion is an almost verbatim repetition of the court's previous opinion on summary judgment. Compare J.S. App. 10a-17a (final judgment opinion), 23a-26a (same), 28a-30a (same) with J.S. App. 246a-253a (summary judgment opinion), 258a-261a (same), 262a-263a (same). The portions of the majority's opinion repeated from its summary judgment opinion recite findings that District 12's boundaries correspond with race; that District 12 splits each of the cities and counties it enters on lines that correspond with race; and that District 12 is unusually shaped under statistical and other measures of compactness.

The facts recited by the district court are accurate, and in an appropriate case they could provide substantial evidence of a predominant racial motive. In the circumstances of this mixed motive case, however, the evidence recited above only frames the question; it does nothing to provide an answer. It merely shows that there must have been *some* motive behind this unusually shaped district and that that motive *might* have been race. But the State produced substantial evidence showing that its predominant motives were political, and that political motives would result in a district with the same unusual shape and the same racial composition. The evidence that District 12's boundaries tend to correspond with race does nothing to distinguish between the two motives and to determine which was the predominant one—the primary issue that remained open for trial after this Court's remand.

Nor is that inquiry advanced by the fact, noted by the district court in its summary judgment opinion and repeated verbatim after trial, that "the uncontroverted evidence demonstrates * * * the legislators excluded many heavily-Democratic precincts from District 12, even when those precincts immediately border the Twelfth and would have established a far more compact district." J.S. App. 25a; see *id.* at 261a (summary judgment opinion). It is true that District 12 excludes a number of adjacent precincts with high Democratic registration; the district court enumerated those precincts in its opinion. See *id.* at 13a-14a; compare J.S. App. 249a-250a (summary judgment opinion). But, as this Court noted in *Hunt I*, the State's evidence "showed that, in North Carolina, party registration and party preference do not always correspond." 526 U.S. at 551. Indeed, the undisputed evidence showed that a large number of registered Democrats in North Carolina regularly vote Republican. See J.A. 397, 780; J.S. App. 173a-174a; 213a-225a.[5] Accordingly, the State asserted that it used actual election returns by precinct—not registration figures—to assess the partisan make-up of precincts and to construct its 1997 plan. The fact that District 12's boundaries sometimes omit precincts that are heavily Democratic by registration does nothing to disprove

---

[5] For example, in 1996, 54% of the State's voters were registered as Democratic, while only 34% were Republicans. *The Almanac of American Politics 1998*, at 1056 (1997). Yet the Republican candidates won in the 1992 and 1996 presidential elections, the State's two Senators at the time of the redistricting were both Republicans (although a Democrat defeated one of them in the 1998 election), and the State's delegation to the 105th Congress consisted of six Republicans and six Democrats (although one of the Democratic seats was won by a Republican in the 1998 election). *Id.* at 1057.

the State's contention that its predominant motive was to create a solidly Democratic District 12, as measured by actual election returns.[6]

This Court stated in *Hunt I* that "[e]vidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference." *Hunt I*, 526 U.S. at 551-552. At bottom, the evidence repeated from the district court's former opinion did no more than show what this Court determined would "not suffice" to prove a racial motivation, much less a predominant racial motivation. Accordingly, the district court's conclusion in this part of the opinion that "where cities and counties are split between the Twelfth District and neighboring districts, the splits invariably occur along racial, rather than political, lines," J.S. App. 25a, must be rejected as unsupported by the evidence.[7]

---

[6] There is an additional defect in the district court's inference, because the district court disregarded "the necessity of determining whether race predominated in the redistricters' actions *in light of what they had to work with*." *Bush*, 517 U.S. at 972 n.*. The fact that District 12 excludes even some adjacent precincts with Democratic voting patterns would be of little significance, unless it could be shown as well that including those precincts would make the District as a whole more Democratic. Where, for instance, the district lines tend to exclude precincts with Democratic tendencies while including precincts with more pronounced Democratic tendencies, the exclusion of the former casts no doubt on the State's claim that it was attempting to draw as highly a Democratic district as possible. The evidence in fact showed that this was precisely what happened here, whether measured by party registration or actual election returns. See Jt. Exhs. 107-109; see also J.A. 140 (testimony by Dr. Weber agreeing that excluded white precincts are not "as heavily Democratic" as the precincts within District 12.).

[7] The State supported its conclusion that the district was drawn along political lines by showing that Republican victories were common in precincts abutting District 12, see J.S. App. 213a- 225a, and that the splits in counties and municipalities divided Democratic portions in District 12 from Republican portions outside District 12, see *id.* at 189a, 191a-192a. The district court did not address that evidence.

B. It Was Clear Error For The District Court To Infer Predominant Racial Motive From Dr. Weber's Testimony

The district court added a brief additional portion to its prior opinion. See J.S. App. 26a-28a. That portion purports to address further the question whether race or partisan considerations was the predominant factor in drawing District 12. Some of the evidence to which the district court refers in this portion of its opinion is essentially repetitious of the evidence discussed above, and it is thus no more helpful in distinguishing between racial and partisan motivations underlying District 12. But the district court also relied on a number of portions of the testimony of Dr. Ronald Weber, appellees' expert, which the district court stated showed "time and again how race trumped party affiliation in the construction of the 12th District and how political explanations utterly failed to explain the composition of the district." J.S. App. 26a. That conclusion, however, was plainly wrong.

Initially, as discussed above, "party affiliation"—as opposed to actual partisan voting conduct—is of little relevance in this case and of no use in the analysis. See pp. 19-20, *infra*. It was therefore error to rely on portions of Dr. Weber's testimony that were based on registration data. Beyond that, however, the evidence presented by Dr. Weber on which the district court relied was not significantly probative of race as the predominant factor in drawing District 12. Accordingly, the court committed clear error in relying on that evidence.

1. The district court cited a portion of Dr. Weber's testimony in which he referred to the fact that District 12 has more Democratic voters than adjoining Democratic

District 8. He stated that the State, had it been following its partisan objectives, would have "want[ed] to take some of the voters in the district that you are drawing that's overly safe and put them into [an] adjacent district so as to make that district more competitive." Tr. 162 (J.A. 91).[8]

The State, however, explained the reason for this configuration. District 12, in general, is no more solidly partisan than are at least two Republican Districts—Districts 6 and 10. See J.S. App. 80a (election results). The proportion of Democrats in District 12 is therefore not suspect. And with respect to the specific line dividing Districts 12 and 8, the State explained that that line runs along the border between Cabarrus County (in District 8) and Mecklenburg County (in Districts 9 and 12). See J.A. 501 (map). To put some District 12 Democrats into District 8, the State would have had to violate two political constraints that were important to the legislature: it would have had to move some of Mecklenburg County into District 8, which would have divided the county into three districts and thus violated the State's consistent policy in the 1997 Plan of placing no county in more than two districts, see J.A. 179, 474-475, 780-782; see also J.A. 658; and it would likely have required moving some of Cabarrus County out of District 8 to District 12 in return, thus violating the desire of Democratic incumbent Hefner in District 8, who lived in Cabarrus County, to represent his entire home county, see J.S. App. 85a; J.A. 205-206.

[8] The district court referred to another portion of Dr. Weber's testimony, in which he made essentially the same point, when it stated that "Dr. Weber showed that, without fail, Democratic districts adjacent to District 12 yielded their minority areas to that district, retaining white Democratic precincts." J.S. App. 26a (citing Tr. 255-256 (J.A. 134-135)). The district court's misapprehension of the record is apparent from its references to "Democratic districts adjacent to District 12," since it is undisputed that, of the five districts adjacent to District 12, only one (District 8) had a Democratic incumbent in 1997. Moreover, the district court did not specify any majority-minority precincts that had been in District 8 in a prior plan and subsequently were "yielded" to District 12, and we are unable to identify any. As the map of District 12 and its surroundings reveals, see J.A. 483, there are no majority-minority precincts near the border between Districts 8 and 12.

The district court did not discuss the State's proffered explanation or otherwise explain why it might be deficient.[9] Dr.

[9] Under Rule 52(a) of the Federal Rules of Civil Procedure, a district court "shall find the facts specially and state separately its conclusions of law thereon." As this Court has stated, "there comes a point where findings become so sparse and conclusory as to give no revelation of what the District Court's concept of the determining facts and legal standard may be." *Commissioner* v. *Duberstein*, 363 U.S. 278, 292 (1960). The courts of appeals, led by the Fifth Circuit, have required that district courts exercise special care under Rule 52(a) in the redistricting context, and the district court's failure to exercise such care is itself grounds for reversal. As the Fifth Circuit has explained, "[b]ecause the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, and because the decision of such a case has the potential for serious interference with state functions," district courts must "strictly adhere[] to the [Rule] 52(a) requirements" that they "find the facts specially" and must "explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning." *Westwego Citizens for Better Gov't* v. *City of Westwego*, 872 F.2d 1201, 1203 (1989) (quoting *Velasquez* v. *City of Abilene*, 725 F.2d 1017, 1020 (5th Cir. 1984)). Other courts of appeals similarly "require a particularly definite record for voting rights cases." *Cousin* v. *McWherter*, 46 F.3d 568, 574 (6th Cir. 1995); accord *Johnson* v. *Hamrick*, 196 F.3d 1216, 1223 (11th Cir. 1999); *Lee County Branch of the NAACP* v. *City of Opelika*, 748 F.2d 1473, 1480 (11th Cir. 1984); *Harvell* v. *Ladd*, 958 F.2d 226, 229 (8th Cir. 1992); *Buckanaga* v. *Sisseton Indep. Sch. Dist.*, 804 F.2d 469, 472 (8th Cir. 1986). The "bedrock rule" that a district court's findings must be "sufficiently detailed to permit a reviewing court to ascertain the factual core of, and the legal foundation for, the rulings below * * * has particular force in cases of this genre." *Uno* v. *City of Holyoke*, 72 F.3d 973, 988 (1st Cir. 1995). That includes the requirement that "the district court must discuss 'not only the evidence that supports its decision but also all the substantial evidence contrary to its opinion.'" *Ibid.*; see also *Velasquez*, 725 F.2d at 1021 (remanding for district court, which wrote a "long and detailed" opinion, to "take note of substantial contrary evidence presented by the appellants"). It also includes the requirement that "when the statistics are the principal evidence offered * * *, the district court must ensure that it thoroughly

Weber admitted that he did not take into account any of the political considerations advanced by the State. See J.A. 135 ("I don't know anything about what Congressman Hefner asked."), 136 (answering "No" to question whether he "inquired about any real world political issues that might have been going on that might have determined why the Legislature drew the line where it did"). Without some reason to discredit the State's explanation, Dr. Weber's analysis does not provide significant evidence of discrimination. Accordingly, the district court's inference of predominant racial motive from Dr. Weber's evidence was "illogical" and, hence, clearly erroneous. See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 577 (1985).

2. The district court also relied on Dr. Weber's testimony that District 12 contains virtually all (76 out of 79) precincts that are 40% or more African-American in the six counties that comprise the district, but it does not contain as high a percentage of precincts with Democratic tendencies, even as measured by election results. Tr. 204-205 (J.A. 105-106). The district court clearly erred in inferring a racial motive—much less a predominant racial motive—from that testimony. The question is not whether there were other precincts in the six counties with Democratic voting patterns that were left out of District 12; the question is whether, if there are such precincts, including them in District 12 would have raised or lowered the overall likely Democratic vote in District 12. If the omitted Democratic precincts are far from the borders of District 12, including them would frequently not have been practical, and, even if it would, expanding the district to include them could easily have required including or excluding other precincts that would have resulted in an

---

discusses its reasons for rejecting that evidence." *Clark* v. *Calhoun County*, 21 F.3d 92, 96 (5th Cir. 1994).

overall boost in Republican strength in District 12.[10] Dr. Weber, however, did not attempt to show that the omitted precincts could have reasonably been included in District 12 or that their inclusion would have in fact raised Democratic strength in the district. Cf. J.S. App. 50a n.21 (Thornburg, J., dissenting) (State's evidence showed that "few of the strong Democratic precincts to which Dr. Weber referred could have easily been included in the Twelfth District"). Without such evidence, Dr. Weber's testimony on this point proves nothing.[11]

3. The district court also relied on page 221 of Dr. Weber's testimony (J.A. 111) in which he argued that splitting a single precinct in Mecklenburg County (Precinct 77, the only split precinct in District 12, see J.S. App. 84a) showed that race was the predominant motive. The State explained that the purpose of splitting that precinct, located at the southernmost tip of Mecklenburg County, was to connect the two portions of Republican Representative Myrick's district without including additional Democratic voters in her district. See J.S. App. 208a; J.A. 20, 617-618. That in turn was in service of the overall goal of protecting incumbents and therefore splitting Mecklenburg County between the two incumbents who lived there—the Democratic incumbent in District 12 and the Republican incumbent in District 9. See J.A. 597-598. Neither the court nor Dr. Weber ad-

---

[10] Insofar as Dr. Weber referred to precincts with Democratic voting patterns adjoining District 12, the evidence showed that those precincts were uniformly *less* Democratic than the precincts included in the district. See p. 20 n.6, *supra*.

[11] The district court also referred to pages 262 (J.A. 139-140) and 288 (J.A. 156-157) of the transcript. In those portions of his testimony, Dr. Weber was being cross-examined regarding his claim that Democratic precincts were left out of District 12. His testimony on cross-examination adds nothing to the analysis. At page 251 of the transcript (J.A. 131), Dr. Weber simply states the conclusion that "[r]ace is the predomina[n]t[] factor." That too adds nothing to the analysis.

dressed that explanation. Although evidence of a single split precinct is unlikely to be significantly probative in any event, the failure by Dr. Weber or the court to explain why the State's explanation was deficient undermines the court's reliance on this testimony to infer predominant motive. See n. 9, *supra*.

4. Taken individually or together, none of the portions of Dr. Weber's testimony on which the district court relied were significantly probative even of race as *a* factor in drawing District 12. Moreover, even if it were otherwise and Dr. Weber's testimony on these points were significantly probative that race was *a* factor in drawing District 12, neither a slight increase in the percentage of Democrats in District 12, a failure to include some isolated Democratic precincts, nor the splitting of a single precinct would suffice to show that race was the *predominant* factor. The district court committed clear error in finding Dr. Weber's testimony sufficient to support an inference that the State's predominant motive in drawing District 12 was race.

C. The District Court's Conclusions From Other Testimony Were Infected By Its Earlier Errors And In Any Event Confuse Evidence That Race Was *A* Factor In Drawing District 12 With Evidence That It Was The *Predominant* Factor

1. The district court stated that "[t]he conclusion that race predominated was further bolstered by Senator Cooper's allusion to a need for 'racial and partisan balance'" in a statement made to the state House Committee on Congressional Redistricting. J.S. App. 27a. At trial, Senator Cooper testified that by "partisan balance," he meant "[k]eeping the 6-6 split," and by "racial balance," he meant "that African Americans would have a fair shot to win both the First and 12th Districts, and I think that's racially fair." J.A. 222. The district court stated, however, that "[t]he Senator's contention that although he used the term 'partisan balance' to refer to the maintenance of a six-six

Democrat-Republican split in the congressional delegation, he did not mean the term 'racial balance' to refer to the maintenance of a ten-two balance between whites and African-Americans is simply not credible." J.S. App. 27a.

When the district court made that credibility finding regarding Senator Cooper's testimony, it had already made the errors recounted above in determining that the statistical and demographic evidence in the case supported an inference of race as the predominant motive. The district court was no doubt influenced by those erroneous conclusions in determining that Senator Cooper's contrary testimony was not credible. Moreover, the district court's inference that because "partisan balance" meant a six-six split, "racial balance" must have also meant a fixed numerical split, is belied by the fact that Senator Cooper's original testimony did not merely refer to "partisan and racial balance," see J.S. App. 27a, but to "*geographic*, racial and partisan balance," J.A. 460 (emphasis added). Because the term "geographic balance" does not suggest the kind of division into neat numerical categories that the term "partisan balance" does, it is apparent that Senator Cooper did not consistently mean by "balance" a fixed numerical division of the districts, as the district court apparently believed.

For the above reasons, the district court's credibility finding regarding Senator Cooper is unsupported. Even if the district court's finding were accepted, however, it would show at most that race was *a* motivation in Senator Cooper's attempt to configure District 12. He had already testified, however, that "we did pay attention to race," and that "[t]hat was one of the factors that was considered," but that "it was certainly not the predomina[nt] factor." J.A. 222. The question in the case thus was never whether race was considered, but whether race was the *predominant factor*. Neither Senator Cooper's statement that he was seeking "geographic, racial and partisan balance," nor his asserted failure to explain what he meant by "racial balance" suggests

that racial balance was the *predominant* motive underlying the creation of District 12—that "[r]ace was the criterion that, in the State's view, could not be compromised." *Shaw II*, 517 U.S. at 907.

2. Finally, the district court relied on the Cooper-Cohen e-mail, in which Gerry Cohen, the legislative employee responsible for actually drawing the 1997 Plan on the computer, had said "I [Cohen] have moved Greensboro Black community into the 12th, and now need to take [a]bout 60,000 out of the 12th. I await your direction on this." J.S. App. 8a; see J.A. 369 (full text of e-mail). Cohen's e-mail on its face merely identified the general characteristics of the community that had been moved into District 12 by referring to its racial composition—which, as this Court has noted, "the legislature always is *aware* of * * * when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw I*, 509 U.S. at 646; see also *Bush*, 517 U.S. at 958 ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."). Accordingly, the question presented by the e-mail is whether the district court properly inferred from that awareness that "the chief architects of the 1997 Plan had evolved a methodology for segregating voters by race, and that they had applied this method to the 12th District." J.S. App. 27a.

As with the Cooper statement, the district court made its inference with respect to the e-mail only after having made its erroneous findings that the statistical and demographic evidence demonstrated a predominant racial motive. Had the district court not made the earlier errors, it might have seen the e-mail in a different light, and it might not have drawn the dramatic conclusion from the e-mail that it did. Indeed, the State had explained that the reason for moving the community into District 12 was in part to avoid splitting Guilford County into three districts—a goal that, as noted above, see p. 23, *supra*, the State followed consistently with

respect to every county in the State in the 1997 Plan—and in part to bolster the Democratic vote in District 12 (a goal desired by the Democratic state Senate and Congressman Watt, the incumbent there) and to subtract Democrats from the vote in neighboring District 6 (a goal desired by Republican Congressman Coble, the incumbent there). See J.A. 192, 193, 195-196, 216, 264-265, 268. The district court did not specifically address or assess the State's evidence that these were the primary motivations for moving the portion of Greensboro into the Twelfth District. See n. 9, *supra*. Without an explanation of the district court's reasons for rejecting the State's proffered explanation, the district court's conclusion from the e-mail is insupportable.

Finally, even if the e-mail were viewed as persuasive evidence that race was *a* factor in moving that portion of Greensboro into District 12, it would not provide sufficient evidence to infer that race was the *predominant* factor in constructing District 12 as a whole. In this respect, again, *Bush* is instructive. In that case, the plurality noted evidence that "the decision to create the districts now challenged as majority-minority districts was made at the outset of the process and never seriously questioned," 517 U.S. at 961, and that those drawing the challenged districts made use of "uniquely detailed racial data," *id.* at 961-962. Nonetheless, the plurality viewed that evidence merely as setting forth the question whether race or politics predominated in drawing the challenged districts, not as providing an answer for that question. Similarly here, even scattered evidence that race was a factor taken into account in determining one or another particular feature of District 12 is insufficient to show that race was the predominant motive underlying District 12 as a whole.

3. As is apparent from a review of the district court's opinion, the court erred in concluding that race was the predominant motive in the creation of District 12. To a significant extent, the court relied on evidence that could not

resolve the central question before the court: whether race or politics predominated in the construction of District 12. Even insofar as the district court, however, relied on evidence that had to do with racial considerations, the evidence showed at most that race was taken into account in creating District 12—a fact that the State conceded from the beginning. Because the district court failed correctly to appreciate and apply the difference between race as *a* factor and race as the *predominant* factor, the district court's conclusion that District 12 is an unconstitutional racial gerrymander cannot stand. To permit a district court to find a predominant racial motive in a case like this would put state legislatures that have acted entirely constitutionally at risk that a district court, finding that race was a factor in one or another feature of a districting plan, could declare the entire plan unconstitutional. That would threaten to immerse the district courts deeply in the highly political thicket of redistricting, and it cannot be squared with the kind of sensitivity toward state legislative efforts in this field that this Court has always required.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
WILLIAM R. YEOMANS
Acting Assistant Attorney General
BARBARA D. UNDERWOOD
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
DAVID K. FLYNN
LOUIS E. PERAERTZ
Attorneys

SEPTEMBER 2000

SEP - 8 2000

Nos. 99-1864 and 99-1865

IN THE

Supreme Court of the United States

JAMES B. HUNT, JR., *et al.*,

Appellants

and

ALFRED SMALLWOOD, *et al.*,

Intervenor-appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

STATE APPELLANTS' BRIEF ON THE MERITS

MICHAEL F. EASLEY
North Carolina Attorney General
Tiare B. Smiley,* Special Deputy Attorney General
Norma S. Harrell, Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919) 716-6900

Walter E. Dellinger
Brian D. Boyle
Crystal Nix Hines
Jonathan D. Hacker
O'Melveny & Myers LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

September 8, 2000 **Counsel of Record*

BEST AVAILABLE COPY

62pp + f/o's

QUESTIONS PRESENTED

(1) Whether a federal court may strike down a state's redistricting plan by substituting its judgment for that of the state legislature, and without requiring the challengers to surmount their heavy burden of demonstrating that race, not politics, was the dominant and controlling rationale in drawing district lines and that traditional redistricting criteria were subordinated.

(2) Whether a final judgment from a court of competent jurisdiction, which holds that a state's congressional redistricting plan does not violate the constitutional rights of plaintiffs and authorizes the state to proceed with elections under it, preclude a later constitutional challenge to the same plan in a separate action brought by plaintiffs in privity with them.

LIST OF PARTIES

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, DENNIS WICKER in his official capacity as Lieutenant Governor of the State of North Carolina, HAROLD BRUBAKER in his official capacity as Speaker of the North Carolina House of Representatives, ELAINE MARSHALL in her official Capacity as Secretary of the State of North Carolina, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, and LARRY LEAKE, S. KATHERINE BURNETTE, FAIGER BLACKWELL, DOROTHY PRESSER, and JUNE YOUNGBLOOD in their capacity as the North Carolina State Board of Elections, are appellants in this case and were defendants below;

ALFRED SMALLWOOD, DAVID MOORE, WILLIAM M. HODGES, ROBERT L. DAVIS, JR., JAN VALDER, BARNEY OFFERMAN, VIRGINIA NEWELL, CHARLES LAMBETH, and GEORGE SIMKINS, are intervenor-appellants in this case and were intervenor-defendants below;

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, R.O. EVERETT, J.H. FROELICH, JAMES RONALD LINVILLE, SUSAN HARDAWAY, LOIS WEAVER, and JOEL K. BOURNE are appellees in this case and were plaintiffs below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

A. The 1997 Congressional Redistricting Process 1

B. Legal Proceedings 6

C. The District Court Opinion 7

SUMMARY OF ARGUMENT 8

I. CAREFUL SCRUTINY OF THE DECISION BELOW IS REQUIRED TO DETERMINE WHETHER PLAINTIFFS HAVE MET THEIR STRINGENT EVIDENTIARY BURDEN FOR PROVING A PREDOMINANT RACIAL MOTIVE. 13

A. Plaintiffs Must Proffer Compelling Evidence That Race Was The Dominant Factor In The District's Design 13

B. A Rigorous Review Of The Record And Decision Below Is Required. 16

C. A Comparison Of The Evidence In This Case With That In Previous Cases Is Warranted. 18

TABLE OF CONTENTS
(continued)

Page

II. THE COURT IMPROPERLY CONCLUDED THAT RACE, NOT INCUMBENCY PROTECTON, WAS THE PREDOMINANT FACTOR IN THE DESIGN OF DISTRICT 12. 21

A. The Court Erroneously Discredited The State's Motives Based On Registration Data Rejected By The Legislature. 23

B. The Court Unreasonably Inferred A Predominant Racial Motive From Expert Testimony That Did Not Refute The State's Showing That Partisanship Predominated The District's Design. 25

C. The District's Shape Was Not Probative Circumstantial Evidence Of Motive Because The Shape Was Justifiable On Both Racial And Political Grounds 34

D. The Panel's Reliance On Isolated Statements By Legislators That Establish, At Most, That Race Was Considered Does Not Establish That Race Predominated 37

III. RECOGNIZED CLAIM PRECLUSION RULES BARRED PLAINTIFFS FROM CHALLENGING DISTRICT 12 41

A. The District Court in Shaw Entered a Final Judgment Holding the Revised District 12 Constitutional. 41

B. The Doctrine of Claim Preclusion Barred Plaintiffs' Successive Challenge to District 12. 43

TABLE OF CONTENTS
(continued)

Page

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

CASES

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 24

Allen v. McCurry,
449 U.S. 90 (1980) 43

Anderson v. City of Bessemer,
470 U.S. 564 (1985) 18

Bush v. Vera,
517 U.S. 952 (1996) ..... passim

Chapman v. Meier,
420 U.S. 1 (1975) 31

City of Mobile v. Bolden,
446 U.S. 55 (1980) 14

Commissioner of Internal Revenue v. Sunnen,
333 U.S. 591, 597 (1948) 43

Federated Department Stores v. Moitie,
452 U.S. 394 (1981) 43, 44

Growe v. Emison,
507 U.S. 25 (1993) 31

Henry v. C.I.R,
170 F.3d 1217 (9th Cir. 1999) 40

Hunt v. Cromartie,
526 U.S. 541 (1999) ..... passim

Jaffree v. Wallace,
837 F.2d 1461 (11th Cir. 1988) 45, 46

TABLE OF AUTHORITIES
(continued)

Page(s)

Jefferson v. Hackney,
406 U.S. 535 (1972) 16

Johnson v. Miller,
864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd*, 515 U.S. 801 (1997) 20

Johnson v. Miller,
922 F. Supp. 1556 (S.D. Ga. 1995), *aff'd sub nom., Abrams v. Johnson*, 521 U.S. 74 (1997) 36

Kilgarlin v. Hill,
386 U.S. 120 (1967) 49

Lawyer v. Department of Justice,
521 U.S. 567 (1997) 35, 37, 39

Llampallas v. Mini-Circuits, Inc.,
163 F.3d 1236 (11th Cir. 1998) 40

Los Angeles Branch NAACP v. Los Angeles Unified School District,
750 F.2d 731 (9th Cir. 1984) 45, 46, 49

Louisiana Seafood Management v. Foster,
53 F. Supp. 2d 872 (E.D. La. 1999) 48

Lucas v. Forty-Fourth General Assembly,
377 U.S. 713 (1964) 49

Lynch v. Donnelly,
465 U.S. 668 (1984) 37, 40

Miller v. Johnson,
515 U.S. 900 (1995) ..... passim

Mueller v. Allen,
463 U.S. 388 (1983) 21

TABLE OF AUTHORITIES
(continued)

Page(s)

NAACP v. Hunt,
891 F.2d 1555 (11th Cir. 1990).....45

NAACP, Minneapolis Branch v. Metropolitan Council,
125 F.3d 1171 (8th Cir. 1997), *cert. denied*, 525
U.S. 826 (1998).....45, 46

Personnel Administrator v. Feeney,
442 U.S. 256 (1979).....14, 24

Petit v. City of Chicago,
766 F. Supp. 607 (N.D. Ill. 1991).....45, 46, 47, 48

Purkett v. Elem,
514 U.S. 765 (1995).....14

Reynolds v. Sims,
377 U.S. 533 (1964).....49

Richards v. Jefferson County,
517 U.S. 793 (1996).....44, 45, 47, 48

Roman v. Sincock,
377 U.S. 695 (1964).....49

Shaw v. Hunt,
517 U.S. 899 (1996)..... passim

Shaw v. Hunt,
92-202-CIV-5-BR, Judgment (E.D.N.C.
September 15, 1997).....42

Shaw v. Hunt,
CA No. 92-202-CIV-5-BR, Order (E.D.N.C. June
9, 1997).....42

Shaw v. Reno,
509 U.S. 630 (1993)..... passim

TABLE OF AUTHORITIES
(continued)

Page(s)

Silver v. Diaz,
522 U.S. 801 (1997).....20

South Central Bell Telephone Co. v. Alabama,
526 U.S. 160 (1999).....47

St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993).....14

Thornburg v. Gingles,
478 U.S. 30 (1986).....18

Tyus v. Schoemehl,
93 F.3d 449 (8th Cir. 1996).....45, 46, 47, 48

United States v. Hays,
515 U.S. 737 (1995).....48

Uno v. City of Holyoke,
72 F.3d 973 (1st Cir. 1995).....18

Upham v. Seamon,
456 U.S. 37 (1982).....35

Vera v. Richards,
861 F. Supp. 1304 (S.D. Tex. 1994).....19

Voinovich v. Quilter,
507 U.S. 146 (1993).....18

Washington v. Davis,
426 U.S. 229 (1976).....13, 24

WMCA, Inc. v. Lomenzo,
377 U.S. 633 (1964).....49

Wright v. Rockefeller,
376 U.S. 52 (1964).....37

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

18 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* (2d ed. 1987).....43, 44, 46

STATE APPELLANTS' BRIEF ON THE MERITS

Governor James B. Hunt, Jr., and the other state defendants below appeal from the final judgment of the three-judge United States District Court for the Eastern District of North Carolina, dated March 7, 2000, which held that District 12 in the State's 1997 Congressional Plan is an unconstitutional gerrymander and enjoined the State from conducting any elections under that plan.

OPINIONS BELOW

The March 7, 2000, majority opinion of the district court and the concurring and dissenting opinion of the Honorable Lacy Thornburg, District Court Judge sitting by designation as Circuit Judge, which have not yet been reported, appear at J.S. 1a and 37a, respectively.[1]

JURISDICTION

The district court's judgment was entered on March 8, 2000. J.S. 71a. On March 10, 2000, the State appellants filed notice of appeal to this Court. J.S. 69a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISION INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment. J.S. 73a.

STATEMENT OF THE CASE

A. The 1997 Congressional Redistricting Process

Last term, a unanimous Court in *Hunt v. Cromartie*, 526 U.S. 541 (1999), held that the district court improperly granted summary judgment to plaintiffs in concluding that race was the "predominant factor" in the drawing of Congressional District 12, and remanded the case for trial. In so holding, the Court

---

[1] References to "J.S." are to the Appendix of the Jurisdictional Statement; references to "J.A." are to the Joint Appendix.

stated that:

> [e]vidence that blacks constitute even a super-majority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference.

Cromartie, 526 U.S. at 551-52.

The trial confirmed in substantial detail the legislature's constitutional engagement in political gerrymandering in making District 12 a strong Democratic district as part of its broader effort to preserve a six-six partisan balance in its congressional delegation. The General Assembly commenced the complex and difficult task of remedying the constitutional defects in the prior 1992 Plan,[2] while at the same time achieving its partisan political objectives. The General Assembly's redistricting efforts were complicated by the fact that political power was divided between a majority Democratic Senate and a majority Republican House. Indeed, when the redistricting process began, many did not believe that the politically divided legislature could successfully negotiate a plan and prevent redistricting from falling to the federal court by default.[3]

An essential aspect of designing a plan acceptable to the politically divided General Assembly was the protection of all twelve incumbents. This was done in part by preserving the constituent and partisan core of each district. Congresspersons and their representatives, as well as their supporters in the

[2] In *Shaw v. Hunt (Shaw II),* 517 U.S. 899 (1996), this Court found that race predominated in the design of District 12 and that it could not survive strict scrutiny.

[3] J.S. 82a, 138a; J.A. 179-80, 240-41.

General Assembly, expressed their preferences throughout the redistricting process.[4] The legislature's task was particularly acute in the western part of the State because it is overwhelmingly Republican; the legislature was thus faced with the difficult challenge of creating loyal Democratic constituencies in Districts 8 and 12, while protecting the Republican strongholds in adjacent Districts 5, 6, 9 and 10. Any changes in the configuration of any of those districts could not undermine the strength of the existing incumbents or the passage of the plan would have been placed in jeopardy.[5]

To achieve its goals, the General Assembly established Senate and House redistricting committees to oversee the redistricting process. Senator Roy A. Cooper, III, a Democrat, was appointed Chairman of the Senate Redistricting Committee and Representative Edwin McMahan, a Republican, was appointed Chairman of the House Redistricting Committee. From the beginning, Cooper and McMahan recognized that the only way to reach a compromise was to craft a plan that, while curing the constitutional defects, also preserved the existing six-six partisan balance in the State's congressional delegation.[6] Because party registration is not a reliable predictor of voting behavior in North Carolina, the committees used the actual votes cast in a series of previous statewide elections to design Democratic and Republican districts.[7]

[4] *See, e.g.,* J.S. 83a-84a, 138a, 207a-10a; J.A. 180-86, 657.

[5] *See, e.g.,* J.S. 83a-86a; J.A. 182, 185-88, 191, 623-24, 634-35, 637-38.

[6] *See, e.g.,* J.S. 82a, 94a, 99a-100a, 138a; J.A. 180, 187-88, 235, 240-41, 406-07, 780.

[7] J.S. 206a-07a; J.A. 397, 779-80. *See also* J.S. 173a-74a. The redistricting computer database included voting results at the precinct level for three state races: the 1988 Lewis/Smith Court of Appeals election, the 1988 Rand/Gardner Lieutenant Governor election, and the 1990 Gantt/Helms United States Senate election. In addition, some more recent election results also were available to the committee chairman through other sources. J.S. 83a-84a, 138a-139a; J.A. 188-90. The results from the two

Computer software allowed the plan's drafters to view voting data by precinct, enabling them to move precincts and draw district boundaries throughout the State based on actual voting patterns.[8]

Acutely conscious of its legal obligations, the General Assembly sought to cure the defects in the 1992 plan by assuring that racial considerations did not predominate over traditional race-neutral redistricting criteria in the drawing of districts. The new plan was thus designed to: (1) avoid dividing precincts; (2) avoid dividing counties, except as needed to maintain partisan balance; (3) eliminate "cross-overs," point contiguity, long narrow corridors and other artificial means of maintaining contiguity; (4) group together citizens with similar needs and interests; and (5) ensure ease of communication between voters and their representatives. Although improving the overall appearance of District 12 and other districts was a major consideration in curing the defects found in the previous plan, mathematical measures of compactness were not utilized in constructing or evaluating the new plan.[9]

Other important legal requirements also influenced the design of the 1997 Plan. First and foremost were federal one person, one vote requirements, which meant that politically desirable precincts along the border of a proposed district sometimes could not be included in a district and still maintain

1988 elections were given the most weight by the legislature because they were a better test of generic party voting preferences. The judges' race, for example, involved candidates who were known to most voters only by their party affiliation. J.S. 206a-07a; J.A. 189. *See also* J.A. 611, 613, 652.

[8] *See, e.g.*, J.A. 518-20, 585-87.

[9] *See, e.g.*, J.S. 82a-84a, 138a; J.A. 179, 190-91, 200-01, 212-13, 382-83, 393-96, 405-06, 431, 464-65, 474, 476.

an acceptable population balance.[10] In addition, with respect to District 1, the legislature sought to comply with the requirements of the Voting Rights Act – an obligation that did not pertain to District 12 or the other districts.[11]

On March 31, 1997, a majority of representatives in both houses voted to enact the new congressional districting plan.[12] The most dramatic changes in the new plan are in District 12, which contains less than 70% of its original population and less than one-half (41.6%) of its original geographic area.[13] Although the House and Senate initially differed on the question of extending District 12 from the city of Charlotte in Mecklenburg County northward either to Winston-Salem (the Senate plan) or to High Point and Greensboro (the House plan), the legislature decided there was no logical reason not to include loyal Democratic voters from all three parts of District 12's Triad,[14] rather than effectively wasting their votes by putting them into districts that were overwhelmingly Republican.[15]

[10] *See, e.g.*, J.A. 613-14, 622, 625. Balancing populations sometimes served other purposes. For example, several precincts in Mecklenburg County were shaved off District 12 to increase the population of District 9 so it did not extend into Lincoln County, and that county could be made whole as part of District 10. J.A. 789-90.

[11] J.S. 85a-86a; J.A. 196, 384. *See also* J.A. 207-09, 385, 621.

[12] Although the 1997 Plan garnered bipartisan support in the divided chambers of the General Assembly, twelve of seventeen African-Americans in the House voted against the plan because they believed it did not adequately take into account the interests of the State's African-American citizens. J.S. 140a; J.A. 242-43.

[13] J.A. 16, 543-44.

[14] The Triad consists of Winston-Salem in Forsyth County, and Greensboro and High Point in Guilford County.

[15] J.A. 192-94, 216, 268, 389. The extension of District 12 to Greensboro boosted the percentage of Democratic voters, based on the two 1988 elections, by five percent. The percent of Democratic voters rose from

To the extent possible, consistent with the difficult task of creating a Democratic district in the predominantly Republican Piedmont Crescent, the 1997 Plan respects the traditional race-neutral redistricting criteria identified by the legislature: District 12 divides only one precinct, for partisan reasons; its appearance is greatly improved over the 1992 plan by being shorter, wider and no longer held together by reliance on artificial devices such as cross-overs and point contiguity. *See supra* note 9. It comprises a district joining together citizens with similar needs and interests in the urban and industrialized areas along the interstate highways that connect Charlotte and the Piedmont Urban Triad,[16] areas in which the bulk of the State's recent population growth has occurred.[17] Moreover, because District 12 is built around major transportation corridors, it functions effectively for representatives and constituents. With 43% of its voting-age population African-American, District 12 is not a majority-minority district.[18] District 12 is, however, a majority Democratic district.

B. Legal Proceedings

After the General Assembly enacted the 1997 Plan, and the 1998 election process had begun, plaintiffs filed suit, challenging the constitutionality of Districts 1 and 12. Plaintiffs moved for a preliminary injunction and for summary judgment. The district court, with Circuit Judge Sam J. Ervin, III, dissenting, granted summary judgment to plaintiffs, declared District 12 unconstitutional, and permanently enjoined the State from conducting any primary or general election under the 1997 Plan. After the State defendants appealed, this

57.48% to 62.20% in the Rand/Gardner election and from 56.59% to 61.46% in the Lewis/Smith election. J.S. 231a, 241a.

[16] *See, e.g.*, J.A. 383, 400-01, 421, 430, 465, 476.

[17] J.A. 151-52, 751.

[18] Only 46.7% of its total population and 45.6% of its registered voter population is African-American. J.S. 77a-79a.

Court reversed and remanded for trial. *Cromartie*, 526 U.S. at 554. On remand, the district court established a schedule for discovery and set a trial date. After the untimely death of Circuit Judge Sam J. Ervin, III, United States District Court Judge Lacy H. Thornburg was assigned to the three-judge panel.

C. The District Court Opinion

The three-judge panel unanimously ruled that District 1 was constitutionally drawn, but a majority ruled that District 12 was an unconstitutional racial gerrymander and enjoined its use in future elections. The majority began by crediting the State's testimony that the 1997 Plan was drawn to protect incumbents and preserve the partisan core of the existing districts. J.S. 11a. Nonetheless, the court rejected legislators' testimony that District 12 was drawn to fulfill those same partisan goals. Instead, in an opinion which substantially repeated its prior summary judgment opinion, *compare* J.S. 11a-19a *with* J.S. 247a-255a, the panel once again focused heavily on circumstantial evidence of the district's racial demographics and shape, and again, used registration data to impugn the state's motives, J.S. 23a-26a, even though legislators testified that they did not use such data in designing the districts because it was not a reliable predictor of voting behavior in North Carolina. *See supra* note 7. The panel also found significant the testimony of plaintiffs' expert, Dr. Weber, and several isolated statements made by one legislator and state official, which, it said, demonstrated a predominant racial motive in drawing the district. J.S. 26a-28a.

Judge Thornburg wrote a concurring and dissenting opinion. He agreed that District 1 was constitutional, while disagreeing with the majority's application of strict scrutiny.[19]

[19] The majority's application of strict scrutiny to District 1 is additional evidence of its misunderstanding of the predominance standard. District 1, which has an African-American population of 50.27%, respects traditional race-neutral redistricting criteria: it divides no precincts; it is compact; and

He dissented as to District 12, concluding that plaintiffs had completely failed to meet their burden of showing that race predominated in drawing the district. Defendants, in contrast, "produced ample and convincing evidence" establishing that legitimate "political concerns such as existing constituents, incumbency, voter performance, commonality of interests, and contiguity, not racial motivations, dominated the process surrounding the creation and adoption of the 1997 redistricting plan." J.S. 45a-46a.

SUMMARY OF ARGUMENT

The central issue in this case is whether race or partisan politics predominantly motivated the North Carolina legislature's design of District 12. In its opinion below, the district court agreed with the State that the General Assembly's 1997 redistricting plan was motivated by a desire to maintain a six-six partisan balance in the State's congressional delegation and to protect incumbents. J.S. 11a. The court also found that the design of District 12 fulfilled those objectives since the district is "one of the six predominantly Democratic districts established by the 1997 Plan to maintain the 6-6 partisan division." *Id.* at 11a-12a. Despite those incontestable findings, the court nevertheless concluded that District 12's lines were drawn predominantly on racial, not political grounds. That conclusion is completely at odds with the

---

artificial devices such as crossovers and point contiguity were eliminated. Irregularities in the district lines are the result of incumbency protection and other political concerns. J.S. 84a-86a; J.A. 197-200, 232-33, 465. It comprises a district with a community of voters defined by shared interests in the mostly rural and economically depressed counties in the State's northern and central Coastal Plain. J.S. 84a-87a; J.A. 200, 475. The district encompasses an area where the African-American population is sufficiently large and geographically compact to constitute a majority in a district, as the court below recognized. J.S. 33a-34a. Except for its concern that the split counties and towns in District 1 correlated with race, the court did not find that race predominated over other traditional redistricting principles in the design of District 1, yet needlessly applied strict scrutiny.

record.

This Court's precedents make clear that plaintiffs bear the burden of proving the unconstitutionality of a state's redistricting plan. To establish an equal protection violation, plaintiffs must show not simply that race was a possible explanation for the district's lines, or even that the district's boundaries correlate closely with race, but rather that the State's asserted predominant nonracial explanation for the district's design is pretextual, and that the primary motivation is racial. "If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify." *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion); *see Cromartie*, 526 U.S. at 552. In light of the potential correlation between race and political voting behavior, "[i]n some circumstances, incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness, in the drawing of bizarre district lines." *Bush*, 517 U.S. at 967 (plurality opinion). Because of the sensitive nature of the legislative districting process – a process reflecting fundamental choices about a sovereign State's political self-identity – and the difficulty of determining predominant motive when both political and racial factors are involved, federal courts are to be "extraordinarily cautious" in evaluating a claim that race and not incumbency protection predominately motivated a State legislature's drawing of district lines. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

The question here is whether this case is one in which the partisan balance achieved by incumbency protection explains District 12's lines "as well as, or better than race." *Bush*, 517 U.S. at 958 (O'Connor, J., concurring). The district court answered that question in the negative: because "political explanations . . . utterly failed to explain the composition of the district," J.S. 26a, race was the real, predominant motivation.

Id. at 25a. The court based that conclusion on three grounds, none of which withstands scrutiny.

First, just as it did in its prior opinion on summary judgment reversed by this Court in *Hunt v. Cromartie*, the court relied on voter *registration* data purportedly showing that majority Democratic precincts were excluded from District 12 to rebut the State's assertion that the district was drawn predominantly to protect incumbents and preserve the partisan balance in the State's congressional delegation. The court's reliance on such evidence is untenable. As even plaintiffs' own expert recognized, voter registration data is *not* a reliable indicator of actual voting performance in North Carolina, and for that reason the legislature did not use it to draw district lines. The court's persistence in using a criterion the State disavowed, while ignoring the criterion on which it relied – partisan voting results – was clearly improper, and contravenes the analyses performed throughout the Court's equal protection jurisprudence.

Second, the court credited plaintiffs' expert's statistical analysis, which showed that predominantly African-American precincts were always included in District 12, while white, Democratic precincts were not. But such facts cannot properly be used to establish a predominant racial motive when the undisputed record *also* shows that the precincts that were included not only are Democratic but are *more reliably* Democratic than their contiguous white counterparts outside of the district. Since the selection of these precincts is fully consistent with the legislature's partisan political goals, their inclusion in District 12 cannot *disprove* the State's nonracial explanation for the district's design.

The court also found significant the claim of plaintiffs' expert that if incumbency protection were the true predominant motive for District 12's design, the State could have – and therefore would have – drawn a different, more compact district with more white precincts in the Piedmont Crescent.

But the few alternatives plaintiffs' expert offered up, which would have entailed splitting a county three ways or disrupting the home bases of sitting incumbents, simply were not practicable. Absent any evidence that the legislature ignored viable alternatives, with less racial impact, the court's inference that District 12's design was motivated predominantly by race was completely unreasonable.

Third, and finally, the court pointed to isolated statements from lawmakers that, it said, supported its conclusion that the legislature's motivations in drawing District 12 were primarily racial. But whether viewed alone or together, these evidentiary strands showed, *at most*, that legislators considered race in redistricting. The *consideration* of race, however, is not impermissible, and certainly is not synonymous with the *predominant* use of race. The court's conflation of these principles was improper.

The frailty of the evidence of racial predominance is even more apparent when one compares the record in this case with that proffered in previous redistricting cases in which this Court has found unconstitutional racial gerrymandering. Unlike in those other cases, there was no evidence here that the State adopted its redistricting plan under federal pressure to create majority-minority districts. Nor were there any concessions from lawmakers that they sought to maximize African-American voting strength. The record also was bereft of any proof that the district's shape was directly tied to efforts to increase minority-voting power or that districts were designed based solely on block-by-block racial data. In short, this evidentiary record nowhere approaches the level of proof of racial predominance found in previous redistricting cases. If anything, the record shows just the opposite – that lawmakers were motivated principally by the nonracial goals of complying with this Court's precedents, protecting incumbents, and preserving the State's partisan congressional balance.

Dramatic improvements to the district's shape also are

probative of the State's efforts to cure its prior constitutional violation and design districts based mainly on race-neutral goals. The district contains less than 70% of its original population and less than one-half of its original geographic area; its length was reduced nearly in half, making it the third shortest district in North Carolina; it splits only one precinct, for partisan reasons, and uses no artificial means of maintaining contiguity. Indeed, to the extent possible, given the difficult task of creating a Democratic district in the predominantly Republican Piedmont Crescent, the legislature followed traditional redistricting criteria. The resulting district, linking the strongly Democratic urban areas of Charlotte, Winston-Salem and Greensboro, is a perfectly sensible way of bringing reliable Democrats in that area together.

The facts in this case, in short, do not permit the inference that plaintiffs satisfied their burden of showing that the State's predominant nonracial explanation for District 12's design was pretextual, and that the primary motivation was racial. The court's error has implications far beyond this case. If the decision below is permitted to stand, legislators either will be reluctant to give *any* consideration to racial factors for fear that such consideration will constitute racial predominance or they will feel compelled to make race-*conscious* decisions to ensure that districts have sufficient concentrations of white voters to overcome a *Shaw* claim. Neither option is desirable or consistent with equal protection law.

There is another reason to set aside the decision below. The challenge to District 12 in this case is barred by the rules of claim preclusion. In the remedial phase of the earlier *Shaw* litigation, the district court explicitly ruled that the 1997 Plan conformed with constitutional requirements and that it was an adequate remedy for the constitutional defects in the prior plan. Following that ruling, the plaintiffs in the *Shaw* litigation immediately filed an amended complaint in this separate lawsuit - in front of a separate panel - alleging for the first time

in this case that District 12 violated the Constitution. While the two District 12 plaintiffs in this case – the only plaintiffs who actually have standing – were not actually plaintiffs in the *Shaw* litigation, those two also were "virtually represented" by the plaintiffs in the *Shaw* litigation under recognized claim preclusion rules. They are therefore bound by the *Shaw* judgment upholding the constitutional validity of District 12. On this ground as well, the decision should be overturned.

This case, in sum, presents two fundamentally different pictures of the legislature's motivations in enacting the 1997 Plan. One portrait is predominantly political, the other, primarily racial. That the court chose the latter over the former greatly misapprehends this Court's precedents and the seriousness of the burden plaintiffs must meet to prove racial predominance in redistricting. Unless that high bar is reestablished through reversal of the decision, the protections accorded inherently political legislative decision-making will be severely undermined, and redistricting plans that, like North Carolina's, do not convey the message that "political identity is, or should be, predominantly racial," *Bush*, 517 U.S. at 980 (plurality opinion), will be improperly invalidated. This Court should not countenance either result.

I. CAREFUL SCRUTINY OF THE DECISION BELOW IS REQUIRED TO DETERMINE WHETHER PLAINTIFFS HAVE MET THEIR STRINGENT EVIDENTIARY BURDEN FOR PROVING A PREDOMINANT RACIAL MOTIVE.

A. Plaintiffs Must Proffer Compelling Evidence That Race Was The Dominant Factor In The District's Design.

The plaintiffs' burden in any race-based Equal Protection Clause challenge is to establish that the State acted with a racially discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 240 (1976). Mere proof that a State was conscious of

racial factors or that its actions had a racially discriminatory impact is insufficient; the plaintiffs must establish that the State acted "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

In cases involving allegations of intentional race discrimination, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from," the party seeking to prove the unlawful discrimination. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). Thus, when the State defendant proffers a legitimate, nondiscriminatory explanation for an action that appears to have a discriminatory impact, the burden cannot shift to the State to prove that the asserted rationale was the real reason; rather, the plaintiff bears the burden of proving that the State's asserted reason was untrue, *i.e.*, a mere "pretext" for the real, discriminatory motive. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason [is] false, and that discrimination [is] the real reason.").

The plaintiffs' burden is even more difficult in redistricting challenges of the type recognized in *Shaw v. Reno*, 509 U.S. 630 (1993). Plaintiffs may not establish an equal protection violation simply by showing the presence of a racial motivation, but rather, must demonstrate that: (1) the state *substantially* disregarded traditional districting criteria in drawing district lines, *and* (2) that it did so *predominantly* because of racial considerations. *See Bush*, 517 U.S. at 958-59, 962-63 (plurality opinion); *id.* at 993-94 (O'Connor, J., concurring). *See City of Mobile v. Bolden*, 446 U.S. 55, 63 (1980) ("The Court made clear that in the absence of such an invidious purpose [racial classification], a State is constitutionally free to redraw political boundaries in any manner it chooses."). This standard means that plaintiffs cannot merely show that race is a credible explanation for the

challenged district's design. Rather, they must affirmatively demonstrate that the *nonracial* explanation offered by the State is *not* its predominant motivation but rather is a mere "pretext" for the predominant racial motive.

In this case, the State avers that the legislature was motivated not primarily by race in the enactment of its redistricting plan, but rather by a predominant desire to maintain a six-six partisan balance in the State's congressional delegation by designing the districts so as to protect incumbents. It is not disputed that race and political voting behavior correlate tightly in North Carolina – the undisputed evidence showed that African-Americans vote 95-97% Democratic.[20] It also is not disputed that, because of that correlation, the lines drawn to create District 12 *could* be explained by race: the most heavily Democratic precincts in the Piedmont Crescent where District 12 is located also are urban precincts whose residents and voters are, by and large, African-American. But the district's shape also derives from a legitimate nonracial goal: protection of incumbents. That goal is legitimate, irrespective of its effect on a district's shape or demographics:

> If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify, just as racial disproportions in the level of prosecutions for a particular crime may be unobjectionable if they merely reflect racial disproportions in the commission of that crime.

Bush, 517 U.S. at 968 (opinion of O'Connor, J.); *see Cromartie*, 526 U.S. at 551 ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State

---

[20] J.A. 139, 213, 589, 603.

were *conscious* of that fact.").

Thus, when race and political voting behavior are closely correlated, it is simply not enough for plaintiffs to establish that race is a possible, good, or even very good, explanation for a district's lines. *See Bush*, 517 U.S. at 968 (opinion of O'Connor, J); *Miller*, 515 U.S. at 916; *Shaw*, 509 U.S. at 646. Plaintiffs must affirmatively demonstrate that the state's asserted rationale of incumbency protection is *not* the predominant motivation for the district's design. Unless they do so, they have not carried their burden of establishing racial predominance. *See Miller*, 515 U.S. at 916. The central issue in this case, then, is whether plaintiffs have proven anything beyond what they showed at summary judgment: that legislators considered race along with a variety of other factors in redistricting, and that the district's borders correlate with race. A careful review of the evidence and the opinion below, as required by this Court, demonstrates that they have not.

B. A Rigorous Review Of The Record And Decision Below Is Required.

This Court has made clear that in redistricting cases, it will rigorously examine the evidence and the lower court's findings of fact and conclusions of law to determine whether a predominant racial motive has been conclusively shown. *See Bush*, 517 U.S. at 959 (plurality opinion). That is because "[t]he distinction between being aware of racial considerations and being motivated by them" and "the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires" an "extraordinarily cautious" review of a claim that a State has "drawn district lines on the basis of race." *Miller*, 515 U.S. at 916. *Cf. Jefferson v. Hackney*, 406 U.S. 535, 551 (1972) (expressing reluctance to "second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients").

Such rigorous review is particularly warranted in "mixed motives" cases in which the State testifies that legitimate districting considerations – such as a desire to protect incumbents and to produce a certain partisan balance in the delegation – played predominant roles but also concedes that race also was a factor in redistricting. *See Bush,* 517 U.S. at 959 (plurality opinion). In such circumstances, a "careful review" of the legislative process is necessary to determine whether race or politics was the predominant factor in the district's design. *Id.*

Careful review of the record ensures that *only* redistricting plans that engender the constitutional harms said to be caused by a predominantly race-based plan are invalidated. Because only the excessive focus on race "convey[s] the message that political identity is, or should be, predominantly racial," *Id.* at 980 (plurality opinion), and that elected officials' primary obligation "is to represent only the members of [their] group, rather than their constituency as a whole," *Shaw*, 509 U.S. at 648, redistricting plans that are nonracial or that are clearly predominantly motivated by race-neutral factors do not carry racially stigmatizing messages. Careful scrutiny of the record and the lower court's decision is thus necessary to make certain that redistricting plans that do not cause expressive harms are not declared unlawful.

The Court has applied such careful scrutiny in other redistricting cases. For instance, in *Bush v. Vera*, Justice O'Connor, writing for the plurality, engaged in a detailed district-by-district evaluation of the evidence and the lower court's findings to evaluate whether the decision below had sufficient support to warrant affirmance. *See* 517 U.S. at 963-971. Justice O'Connor stated:

> [b]ecause it is clear that race was not the only factor that motivated the legislature to draw irregular district lines, we must scrutinize each challenged district to determine whether the District Court's conclusion that

> race predominated over legitimate districting considerations, including incumbency, can be sustained.

Id. at 965. *See also Voinovich v. Quilter*, 507 U.S. 146, 154-58 (1993) (invalidating judge's finding of fact and/or mixed findings of law and fact that a Section 2 Voting Rights Act violation occurred); *id.* at 158-60 (invalidating the district court's finding that the redistricting plan violated the Fifteenth Amendment because the apportionment board intentionally diluted minority voting strength for political reasons). The same kind of rigorous scrutiny the Court has applied in previous cases is warranted here. And that scrutiny leads to only one conclusion: the decision below is clearly erroneous[21] and requires reversal.

C. A Comparison Of The Evidence In This Case With That In Previous Cases Is Warranted.

Before turning to the court's opinion, it is useful to bear in mind the level of record evidence of predominant racial

[21] It is unclear whether a *de novo* or a clearly erroneous standard applies in this case. While the court purported to apply this Court's predominance test, its opinion reveals that it essentially treated evidence that the district's lines correlated with race and that race was *a* motivating factor as sufficient proof to invalidate District 12's design. This is an application of the wrong legal standard, warranting *de novo* review. Alternatively, if the court did, in fact, apply the predominance standard, its conclusion that race predominated District 12's design is clearly erroneous. *See Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (holding in a case alleging a violation of Section 2 of the Voting Rights Act that courts may correct a finding of fact that is "'predicated on a misunderstanding of the governing rule of law'"); *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (factual findings may be overturned if "the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed"); *Uno v. City of Holyoke*, 72 F.3d 973, 978 (1st Cir. 1995) (noting in a voting rights case that "[t]hough the clear error standard is formidable, it is not a juggernaut that crushes everything in its path"). Under either standard, the decision fails.

motivation present in the Court's previous cases. When viewed against this yardstick, it becomes even more apparent that the plaintiffs have failed to carry their evidentiary burden under the predominance test.

In *Miller*, *Bush* and *Shaw*, the record contained clear direct evidence of predominant racial intent by the Georgia, Texas and North Carolina legislatures, respectively. This compelling evidence consisted, in whole or in part, of the following: (1) letters from the Justice Department insisting that African-American voting power be maximized through the creation of majority-minority districts;[22] (2) refusals from the Justice Department to preclear the State's legislative plans as insufficiently empowering for black voters;[23] (3) admissions by the state defendants that the challenged districts were drawn precisely to maximize minority voting power and/or comply with the Voting Rights Act,[24] and (4) the use of census blocks

[22] *See Shaw II*, 517 U.S. at 902 (noting that the Justice Department insisted that two majority-minority districts be created and "opined that the State's reasons for not creating a second majority-minority district 'appeared to be pretextual'"); *id.* at 913; *Miller*, 515 U.S. at 917, 920.

[23] *See Shaw II, 517 U.S.* at 906, 913; *Shaw*, 509 U.S. at 685; *Miller*, 515 U.S. at 917, 919.

[24] *See Vera v. Richards*, 861 F. Supp. 1304, 1314-16 (S.D. Tex. 1994) (finding that the legislature created a number of "safe" black and Hispanic districts in order to address Voting Rights Act concerns and prepared a "Narrative of Voting Rights Act Considerations in Affected Districts"); *see also id.* at 1337 ("The defendants concede that Congressional Districts 18, 29, 30 were created for the purpose of enhancing the opportunity of minority voters to elect minority representatives to Congress."); *Bush*, 517 U.S. at 961 (plurality opinion) (State concedes "that the three districts at issue 'were created for the purpose of enhancing the opportunity of minority voters to elect minority representatives to Congress'"); *see id.* at 960-61 (noting race-based concessions in State's preclearance submission to the Justice Department); *Shaw II*, 517 U.S. at 906 (State concedes that the redistricting plan's "*overriding* purpose was to comply with the dictates of the Attorney General's . . . letter and to create two congressional districts with effective black voting majorities'"); *Miller*, 515 U.S. at 910 (defendants did not dispute the court's factual finding of predominant racial

to draw districts, which provide only total population and racial data.[25] The circumstantial evidence of the districts' bizarre shape was directly tied to admitted efforts to comply with efforts to maximize African-American voting power.[26]

While the Court has never required proof of all such factors to sustain a constitutional challenge, it certainly has never permitted a redistricting plan to be struck down when the record contains *none* of these factors. The omissions in the record are telling:

• The record does not have any letters from the Justice Department insisting that the State maximize African-American voting strength. To the contrary, the State communicated with the Government only *after* the plan's passage, and then only to inform it that it did not believe that any majority-minority district other than District 1 was justified. J.A. 385. *See also* J.A. 206-09, 597.

• The State never conceded that race predominated District 12's design or that it intended to make that district majority-minority. Quite the opposite, it pursued decidedly nonracial, political goals and significantly reduced District 12's African-American population to below 50 percent. *See supra* note 18.

---

motivation); *see id.* at 918 (conceding that "it is undisputed that Georgia's eleventh is the product of a desire by the General Assembly to create a majority black district").

[25] *See, e.g., Bush*, 517 U.S. at 961-62, 970 (plurality opinion) ("unprecedented" use of census block data "enabled districters to make more intricate refinements on the basis of race than on the basis of other demographic information"); *Johnson v. Miller*, 864 F. Supp. 1354, 1377-78 (S.D. Ga. 1994) (legislature engaged in a "block by block search for black voters to add to the [district]"), *aff'd*, 515 U.S. 900 (1995). *See also Silver v. Diaz*, 522 U.S. 801 (1997) (three judge court) (invalidating district that was at points "one-block long" and "curve[d] and weave[d] among streets blocks" to pick up minority voters).

[26] *See Shaw*, 509 U.S. at 685-86; *Shaw II*, 517 U.S. at 906; *Miller*, 515 U.S. at 917.

• The State drew districts based on precincts, which are much larger than census blocks, and include political data.[27]

• Since the record is devoid of evidence that lawmakers were pressured to, and pursued, a policy of maximizing African-American voting strength, there is no proof that the district's shape was tied directly to that policy.

In short, as a review of the record and the decision below reveals, there is simply no basis to support the court's conclusion that plaintiffs satisfied their difficult burden of proving that the district's lines were drawn predominantly on race and that traditional redistricting criteria were subordinated.

II. THE COURT IMPROPERLY CONCLUDED THAT RACE, NOT INCUMBENCY PROTECTON, WAS THE PREDOMINANT FACTOR IN THE DESIGN OF DISTRICT 12.

It is axiomatic that, in determining whether a constitutional violation has occurred, a court must start with the presumption that a state legislature has acted in good faith and for permissible motives. *See Mueller v. Allen*, 463 U.S. 388, 394 (1983). That presumption fully applies in redistricting cases. *See Miller*, 515 U.S. at 916 (applying "presumption of good faith that must be accorded [all] legislative enactments"). Indeed, it is particularly important in redistricting cases in light of the "complex interplay of forces that enter [into] a legislature's redistricting calculus" and the core sovereignty function the redistricting process represents. *Id.* at 915-16. Thus, "although race-based decision making is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed." *Id.* at 915 (citation omitted).

In this case, the district court, in fact, specifically found that the 1997 Plan was generally drawn to maintain the six-six

---

[27] J.A. 518-20, 585.

partisan balance in the State's congressional delegation, and, to that end, had two legitimate, nondiscriminatory goals: "(1) to avoid placing two incumbents in the same district and (2) to preserve the partisan core of the existing districts to the extent consistent with the goal of curing the defects in the old plan." J.S. 11a. The panel further acknowledged that "[t]he plan as enacted largely reflects these directives: incumbent Congressmen generally do not reside in the same district, and each district retains at least 60% of the population of the old district." *Id.* Finally the court recognized that District 12 is, in fact, "one of the six predominantly Democratic districts established by the 1997 Plan to maintain the 6-6 partisan division" in the congressional delegation. J.S. 11a-12a.

Yet, despite the court's recognition that the legislature was pursuing legitimate redistricting goals, it relied principally on three stands of evidence to rule that District 12 was not designed predominantly to further those goals. First, the court used registration data to support its conclusion that the district's design was based predominantly on racial factors. Second, relying on the testimony of the plaintiffs' expert, the Court concluded that racial statistics, and only racial statistics, could explain District 12's boundaries. According to the court, the "uncontroverted evidence" demonstrated that:

> The *only* clear thread woven throughout the districting process is that the border of the Twelfth district meanders to include nearly all of the precincts with African-American populations proportions of over forty percent which lie between Charlotte and Greensboro, inclusive.

J.S. 25a (emphasis added); *see id.* 26a ("political explanations utterly failed to explain the composition of the district").

Third, the court relied on a few isolated statements by defendants that, it said, evinced a racial motive. *Id.* 27a-28a. Whether standing alone or taken together, these evidentiary

strands are insufficient to refute the State's showing that partisan politics provided the predominant motivation for District 12's design.

A. The Court Erroneously Discredited The State's Motives Based On Registration Data Rejected By The Legislature.

Repeating an error it made on summary judgment, the court again used *registration* data to impugn the State's motives. This was plainly wrong. .

The court relied on maps that showed Democratic registration percentages by precinct. Using this data, the court focused on a few precincts adjacent to District 12 with Democratic majority voter registration rates that were not included in the district. *See, e.g.*, J.S. 13a ("[A]round the Southwest edge of District 12 (in Mecklenburg County), the legislature included within the district's borders several precincts with racial compositions of 40 to 100 percent African-American, while excluding from the district voting precincts with less than 35 percent African-American population, but heavily Democratic voting *registrations*.") (emphasis added); *id.* at 13a-14a (citing precincts in Mecklenburg and Forsyth Counties adjacent to, but not included in District 12, with Democratic "registrations" the court considered significant).

Such "findings" are wholly irrelevant. It was undisputed at trial that voter registration is not a useful indicator of actual voting performance in North Carolina. Indeed, as plaintiffs' own expert acknowledged: "registration data is the *least reliable* data to use for purposes of talking about political performance." J.A. 118 (emphasis added); *see Cromartie*, 526 U.S. at 551 ("[Defendants' expert's] more complete analysis was significant because it showed that in North Carolina, party registration and party preference do not always correspond."). For that reason, the uncontroverted evidence established that

the State used actual partisan voting patterns, not registration data, to draw district lines. *See supra* note 7. The court's failure to evaluate the State's actions against the criterion it *used*, and its reliance on a criterion the State expressly did *not* use – to conclude that race predominated the district's design cannot withstand scrutiny.

The court's approach is fundamentally at odds with settled law. In evaluating whether a state's asserted justification for a particular action is pretextual, its asserted rationale has *always* been compared with the criterion it used to achieve its goals. *See, e.g., Davis,* 426 U.S. at 245-46 (comparing State's use of a written personnel test to hire police officers against State's asserted justification that the test was necessary to predict job performance); *see id.* at 267 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 433 (1975) ("We were unable 'to determine whether the criteria *actually* considered were sufficiently related to the [employer's] legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact.'") (emphasis in original); *Feeney*, 442 U.S. at 265, 275-80 (comparing hiring preference for veterans alleged to discriminatorily impact women against State's asserted goals). A predominant racial motive simply may not be derived by comparing the State's asserted rationales against a criterion it did not use.

Ironically, even if the legislature had used registration data, rather than voting patterns, to design District 12, the court's opinion still would be unfounded. The registration data demonstrates that, with only very rare exceptions, the precincts outside of District 12 consistently have Democratic registration below 60%, while the adjoining precincts inside the district consistently have much higher Democratic registration rates – ranging from 60% to over 90%.[28]

[28] Joint Exhibits 107-109 (filed with the Court). On the rare occasions when a precinct within the district is between 50% and 60% in Democratic registration, the Democratic registration for each such precinct consistently is higher than that for its adjoining "excluded" precinct. *See id. See also* App. Br. at 1-3 (maps based on Joint Exhibits 107-109 contrasting Democratic registration figures for precincts inside and outside of District 12).

B. The Court Unreasonably Inferred A Predominant Racial Motive From Expert Testimony That Did Not Refute The State's Showing That Partisanship Predominated The District's Design.

The court also based its racial predominance ruling on particular passages from the testimony of plaintiffs' expert, Dr. Ronald Weber, who – according to the court – "showed time and again how race trumped party affiliation in the construction of the 12th District and how political explanations utterly failed to explain the composition of the district." J.S. 26a. For the critical propositions that "race trumped party affiliation" and that incumbency protection "utterly failed" to explain the shape of the district, the court relied on six distinct passages from Weber's testimony: J.S. 26a (citing Trial Transcript ("Tr.") pages). Not *one* of those passages supports either proposition.

The cited testimony makes the following points:

(1) Tr. 162-63 (J.A. 90-91): District 12 was not designed principally to further a partisan political agenda because it is more Democratic than necessary to elect a Democratic incumbent. Had the legislature really wanted to protect incumbents, it would have taken some voters out of District 12 and placed them in adjacent District 8 to make it more Democratic.

(2) Tr. 204-05 (J.A. 105-07): The counties in District 12 are always divided along racial lines, while predominantly white Democratic precincts were excluded.[29]

[29] This testimony also suggests that a Democratic district could have been drawn using Mecklenburg County as the anchor. The feasibility of this idea is addressed below. *See infra* at 32-33.

(3) Tr. 221 (J.A. 111): Every African-American precinct that could have been assigned to District 12 was assigned, while adjacent districts retained their white Democratic precincts.[30]

(4) Tr. 251 (J.A. 131): When race and politics are disentangled, race predominated the district's design.

(5) Tr. 262 (J.A. 139-140): The assignment of precincts in District 12 is inconsistent with a political motivation because white Democratic precincts were excluded.

(6) Tr. 288 (J.A. 156): A Democratic district could be drawn without putting all of the African-American precincts in that district.

Because the sum total of Weber's testimony proves nothing more than a close correlation between race, voting patterns and District 12's borders, it "utterly failed" to establish that race predominated the district's lines.[31]

---

[30] Weber also suggests in this citation that Precinct 77 could have been swapped with "a precinct or two in Forsyth County and have the same partisan result." J.A. 111. This suggestion is discussed below. *See infra* at 30-33.

[31] Weber's testimony was questionable from the start. First, he *presumed* a predominant racial motive from the outset, without considering alternative theories. J.A. 136-37. *See also* J.A. 746. Second, Weber testified that he did not believe that legislative bodies should be entrusted to draw redistricting plans. J.A. 150-51. Finally, Weber erroneously assumed that the State's computer database only permitted legislature's to view and manipulate precincts based on racial factors:

> The computer screen used by the North Carolina Legislative GIS System displays racial breakdowns as the plan designer is working *and does not display political breakdowns*.... Assessment of the political character of a district is post-hoc and *cannot be done while precincts are being allocated to a district*.

J.A 302 (emphases added). Weber repeated this error at his deposition, just eight weeks before trial, and did not abandon it until his cross-examination. J.A. 138-39. His supposition was plainly wrong. *See* J.A. 519-20 (showing

First Record Citation

Weber's first assertion that the State's motives were predominantly race-based because the district was overly Democratic was predicated on his view that a 60 percent partisan majority is optimal. J.A. 91. But an examination of voting patterns in the elections the legislature used to draw district lines – elections tracked in the State's computer database and relied on by the plan's drafters – shows that District 12 was *three* percentage points above Weber's optimum figure,[32] and thus, hardly can be said to be overly packed with Democrats.[33] Moreover, *two Republican districts*, 6 and 10, also exceeded the 60-percent figure,[34] and thus, were "overly" Republican. If no impermissible motives are drawn from the creation of two "overly safe," J.A. 91, Republican districts, then no nefarious purpose can be derived from a similar allocation in a Democratic district.

---

the political data available to the legislators by precinct). This case is thus significantly different from previous cases in which only racially laden, census block data was available. *See supra* at 19-20.

[32] This figure is derived by averaging Democratic voting returns for the three elections the legislature used to draw district lines. *See* J.A. 80a. Weber's reliance on a single election, the 1990 Senate race, is misplaced because the legislature used all three elections in redistricting. J.S. 206a-207a. Using the Gantt-Helms race alone skews the results because Gantt was the Mayor of Charlotte in District 12, and thus drew higher than average Democratic returns. The State also considered the judges' race, not the Gantt-Helms race, the most reliable indicator of actual party preference because voters generally are unaware of individual candidates' qualities. However, even considering that race alone, Republican Districts 6 and 10 also *exceed* Weber's 60-percent optimum partisan range. J.S. 80a.

[33] Even Weber concedes that all politicians prefer their districts to be as safe as possible. Tr. 265 ("I never met a politician who would admit their district was too safe").

[34] J.A. 80a. This result is derived by averaging Republican voting returns in the three elections tracked in the legislature's database. *See supra* note 7.

Second, Third and Fifth Record Citations

The contention Weber makes in the second contention – that the counties included in District 12 follow racial lines – is really the same as the point made in the third and fifth citations: that District 12 always includes African-Americans, to the exclusion of available white Democrats. That observation provides crucial evidentiary support for the district court's finding of pretext:

> Dr. Weber showed that, without fail, Democratic districts adjacent to District 12 yielded their minority areas to that district, retaining white Democratic precincts. This testimony served to undermine Defendants' contention that race was merely a factor in creating the 1997 Plan's 12th District, and that a desire to place high-performance Democratic areas (which happen to contain minority populations) within Democratic districts could explain the construction of the 12th.

J.S. 26a-27a (citation omitted).

But that conclusion – and the testimony cited to support it – ignores a key, uncontroverted fact: all of the precincts inside District 12 had *higher* Democratic voting rates (and even higher registration rates) than their contiguous white counterparts outside the district.[35] Even Weber was forced to concede this point. J.A. 140 ("Q: Are the white precincts as heavily Democratic? A: No."). The conclusion that race predominated over partisan politics only could be established if it could be shown either that predominantly African-American precincts were included in the district, even though they were *not* reliably Democratic on election day (thus permitting a permissible racial inference to be drawn from the deviation

[35] J.S. 213a, 217a, 221a (maps comparing voting patterns of contiguous precincts inside and outside of District 12).

from the asserted political criterion) or that contiguous white precincts that were *equally loyal* or *more loyal* to the Democratic Party consistently were excluded from the district. Weber's evidence showed neither.[36]

Obviously the district's lines had to be drawn somewhere, and some Democratic-performing precincts would have to be left out. But since the precincts actually assigned to District 12 are the most heavily Democratic, the pattern is perfectly consistent with the State's partisan political explanation, and certainly does not establish pretext. And since African-Americans in the State vote 95-97% Democratic, *see supra* note 20, the fact that the more reliable Democratic precincts also are the most heavily African-American is not at all surprising. Nor is it probative of racial predominance that the divisions of the counties and towns between District 12 and the surrounding districts comport with race, since all the districts were drawn to further partisan political goals, and race and political loyalties in North Carolina are closely correlated.[37] Notably, the precincts and counties in the adjacent Republican districts evince the *same* correlation between race and voting patterns as those in District 12: they are nearly 90%

[36] As the state's expert, Dr. Peterson, concluded after comparing all of the contiguous precincts inside and outside of the district: "[I]n the great majority of instances, the boundary of the 12th District serves to fence in Democrats rather than to fence them out." J.S. 173a. The Court in *Cromartie* deemed Peterson's "more thorough" analysis as "significant because it showed that in North Carolina, party registration and party preference do not always correspond." 526 U.S. at 541. Weber and the district court majority, however, inexplicably dismissed Peterson's segment analysis as "unreliable" in part because he ignored the "core" of the district. Peterson's analysis, however, responded directly to the court's own analysis comparing precincts along the outside of the district boundary with those inside the boundary, except that Peterson looked at all of the precincts and political data, not just registration figures. J.S. 161a-167a, 178a-182a. Weber also compared selected precincts along the district's borders. *See, e.g.*, J.A. 104.

[37] *See* J.S. 189a-91a; J.A. 250-52. *See also* J.A. 564 & n.1.

Republican *and* white.[38] Yet, this nexus among white voters, which bolsters the State's position that the district's lines were the product of a preexisting correlation between race and politics, was left unaddressed.

At bottom, these three record citations do nothing more than demonstrate a correlation between race and District 12's borders. Such a correlation is hardly sufficient to prove that race was the "dominant and controlling" consideration in the district's design and that traditional redistricting criteria were subordinated. *Shaw II*, 517 U.S. at 905; *Miller*, 515 U.S. at 913. Ironically, given the absence of viable Democratic alternatives, the only reason for a legislature seeking to shore up a Democratic district to do what Weber and the court suggest – prefer less reliable districts over more reliable ones – would have been to "whiten up" the district – a constitutionally impermissible goal.

Fourth Record Citation

Because Weber's testimony fails to establish racial predominance, his conclusion at the end of his direct testimony, that race predominated District 12's design, is of no moment. J.A. 131. Since Weber's testimony fails to prove predominance, then his conclusion based on that testimony likewise is of little value.

Sixth Record Citation

Weber's claim that the legislature's political explanation is belied by the availability of an alternative Democratic district that would not need to include as many African-American precincts is completely unfounded. Although the court gave this claim particular significance, *see* J.S. 26a, the record is devoid of any realistic alternatives.[39] Nowhere does Weber

[38] J.S. 77a-79a.

[39] Even if the district could have been designed differently, that would not, in and of itself, establish invidious discrimination. The decision to prefer one design to another is purely the province of the legislature, and the constitutionality of a state's redistricting plan should not depend on the individual preferences of statistical experts or federal courts. *See Miller*, 515 U.S. at 915; *Growe v. Emison*, 507 U.S. 25, 34 (1993); *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

even demonstrate that his so-called alternatives would significantly improve the district's shape.[40]

Weber's first attempt at crafting an alternative is to point out that Precinct 77, which was split in the 1997 Plan, could have been moved entirely out of District 12 and into District 9. J.A. 110-11. Not only is Precinct 77 in Mecklenburg County, the home base of the Democratic incumbent, but the district to which Weber seeks to assign it, District 9, is represented by Republican incumbent Sue Myrick. Shifting these Democratic voters into a predominantly Republican district would have wasted their votes, and made both districts less safe for their incumbents – the precisely opposite goal of the legislature. Moreover, it is simply impossible to see how Weber's testimony about Precinct 77 supports the conclusion that a more compact district could have been created. Not even Weber claims that moving this single precinct out, and adding others in, would have made the district more compact.

Weber's second attempt is to claim that some of District 12's predominantly African-American precincts could have been placed in adjacent District 8. But this proposal is

[40] Assuming *arguendo* that Weber had been able to identify a few precincts that actually could have been moved out of District 12 and into District 8 to make the latter more safe, that hypothetical possibility could hardly be probative of a predominantly racially discriminatory motive given the almost unimaginable complexity of the districting process. To infer that race and not incumbency protection was the State's predominant motive on the basis of slender deviations from an asserted hypothetical norm would contravene the Court's admonition that courts respect legislative prerogatives and exercise "extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916.

unworkable. Moving District 12's precincts in Mecklenburg County into District 8 would have split the county three ways between three incumbents – Sue Myrick, Mel Watt, and Bill Hefner. This approach would have disrupted the political bases of two incumbents who both live in Mecklenburg's County's main city, Charlotte. Moreover, as even Weber concedes, a three-way split would have contravened the legislature's goal of not dividing any county into more than two parts,[41] and also would have been likely to raise the suspicion of a federal court for failing to respect traditional redistricting criteria.[42]

Weber also suggested the possibility of using essentially all of Mecklenburg County as the anchor for a Democratic district in the Piedmont Crescent. J.A. 133. The district court did not cite or rely on that suggestion, and it is easy to see why. For the reasons just discussed, Mecklenburg County *had* to be split between a Republican and a Democratic district, because both Democratic and Republican incumbents live in the county seat of Charlotte.[43] Moreover, as even Weber concedes, a

[41] J.A. 179, 754.

[42] Though Weber did not offer any other possibilities for swapping some of District 12's precincts with those in District 8, it bears mention that, as a map of the 1997 Plan shows, *see* J.A. 501, District 8 also could not have expanded further north to reach the Democratic precincts in Rowan County because those precincts are blocked by a large Republican buffer of Republican precincts. Legislators would thus have been forced to include too many Republican precincts in Rowan County before reaching the Democratic precincts in that county, undermining District 8's Democratic base and diluting adjacent District 6's Republican base. District 8 also could not have gone northwest into Iredell County because that would have split District 12 in half, or divided Iredell County between three districts and significantly reduced District 12's width.

[43] Even if such a unified county had been politically feasible, neither Weber nor the court explains how the rest of a Twelfth Democratic district centered around Mecklenburg County could have been drawn, and no realistic options are apparent. For instance, Mecklenburg could not have been joined to neighboring Cabarrus County since Cabarrus was Hefner's home base, and he insisted that his entire county remain in District 8. J.S. 208a; J.A. 205-06, 661-62, 781-82.

Mecklenburg district would have been only "marginally Democratic," *id.*, and thus, would not have served the State's goal of making a sufficiently safe district to protect the incumbent.[44]

***

In sum, the district court's conclusion that Weber's statistical analysis "showed time and again . . . how political considerations utterly failed to explain the composition of the district," J.S. 26a, was clear error. A predominant racial motive simply cannot properly be inferred from evidence establishing that African-American majority precincts are consistently assigned to District 12 when the undisputed evidence *also* shows that those selfsame precincts are not only reliably Democratic but *more* reliably so than their predominantly white, Democratic counterparts.

It also was unreasonable for the court to infer a predominant race-based motive from Weber's claim that District 12 is too Democratic to be explained by incumbency protection, and that a different district would have been drawn if that had been the State's true predominant goal. Those inferences ignore the existence of Republican districts above

[44] In a colloquy during trial, Judge Boyle noted that District 12 in the 1998 Plan was more compact and that the Democratic incumbent prevailed in the 1998 election under that plan. J.A. 204-05. The district court's opinion, however, did not cite or rely on the 1998 Plan as evidence that the State could, hypothetically, have drawn a more compact, sufficiently Democratic district and thus must not have been motivated by partisan considerations. In any event, it is not disputed that the 1998 Plan is much *less* Democratic and, thus, affords a sitting incumbent much less protection than the 1997 Plan. The 1998 Plan eliminated all of Guilford County from District 12, and assigned it, along with loyal Democratic voters, to overwhelmingly Republican Districts 5 and 6, effectively nullifying their votes. *See, e.g.*, J.A. 192-94, 625.

Weber's optimal party level, as well as the undisputed political and geographic constraints on the districting process. Perhaps most devastating is the complete absence of any viable alternatives for a Democratic district in the Piedmont Crescent. In short, nothing Weber offered even tended to show – much less conclusively prove – that incumbency protection did not explain District 12's lines "as well as, or better than, race." *Bush*, 517 U.S. at 968 (O'Connor, J., concurring).

Indeed, when the record evidence is viewed through the proper lens, a striking irony emerges from the decision below. The district court, not the State, seems predisposed to define voters in and out of District 12 based on their race. As noted above, the court's descriptions of the precincts and sections of cities and counties in District 12 are consistently put in racial terms, when in every single instance, the court could just as readily have substituted the phrase "loyal Democrat" for "African-American." And in focusing on the State's failure to prefer the "excluded" majority-white precincts over those actually most loyal to the Democratic party, the panel's opinion effectively suggests that the legislature *should* have been motivated by race – that it should have preferred the "whiter" but less Democratic surrounding precincts over the "blacker," but more Democratic included precincts. Surely *Shaw* claims were never intended to turn the central guarantee of equal protection – race neutrality – entirely on its head.

C. The District's Shape Was Not Probative Circumstantial Evidence Of Motive Because The Shape Was Justifiable On Both Racial And Political Grounds.

This Court consistently has held that the "bizarre" shape of a district "may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913. Relying on this principle, the district court focused on the "meander[ing]"

shape of the district and its evident diversions to "pick up" African American voters, J.S. 25a; *see id.* at 12a-17a, 26a. But the fact that the district's shape was *capable* of being explained by racial factors did not prove that race was the predominant factor. As Justice O'Connor stated in *Bush*: "In some circumstances, incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness in the drawing of bizarre district lines." 517 U.S. at 968.

Dramatic improvements in the district's shape, moreover, only bolstered the legislature's partisan non-racial explanation. At the outset, it bears mention that the legislature's legal obligation was to remedy the constitutional violations in its prior plan, not to begin completely anew in drawing its districts. In accomplishing that objective, the legislature did what other courts and legislative bodies in similar circumstances have been instructed to do: retain the core of the prior redistricting plan, while taking those steps necessary to cure the constitutional violation. *See, e.g., Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam); *Lawyer v. Dep't of Justice*, 521 U.S. 567, 574, 577-81 (1997).

Yet, despite the narrow scope of its constitutional obligation, the legislature made sweeping changes to District 12. As even the court below conceded, the new district eliminated nearly one-third of its population and three-fifths of the land from the prior 1992 design. The district also was shortened by 65 miles from its former length of 160 miles, making it the third shortest district in North Carolina. In addition, legislators widened the district and eliminated split precincts, point contiguity, cross-overs and other artificial means of maintaining contiguity. *See supra* note 9. As much as possible, the district followed natural boundaries such as city lines, main roads and transportation corridors. The district's African-American population was reduced from 56.63% to 46.67% and its African-American voting age population was

reduced from 53.34% to 43.36%. The precincts that were included in District 12 shared a community of interest emanating from their position as urban areas that ran along a major transportation corridor. *See supra* note 16.[45]

In the face of these dramatic changes and the legislature's adherence to traditional redistricting criteria, the court's dismissal of such changes as being of "limited value" and not "advanc[ing]" the State's argument that partisanship dominated the district's design, J.S. 24a, was erroneous. To be sure, District 12 is longer and thinner than the other districts. But that is explained by legitimate and unavoidable political and geographic factors. The goal of creating a Democratic district in the Piedmont Crescent could not be achieved by drawing a circle; the district had to be elongated because the main cities in this part of the State with significant Democratic populations – Charlotte, Greensboro and Winston-Salem – themselves stretch North and South along the Piedmont Crescent. The thinness of the district is attributable to the dense population in that area of the State; expanding the district's lines would have exceeded the population balance and swept in too many neighboring Republican precincts. The legislature also was constrained by the political reality that neither party intended to cede the major cities of Charlotte, Greensboro or Winston-Salem to the other.[46] Moreover, as indicated above, the legislature had to draw the district's boundaries in such a way as to preserve both the Democratic character of District 12 and the Republican character of neighboring districts 5, 6, 9, and 10. Thus, the court's conclusion that the district "winds" and

[45] In this respect, District 12 is similar in concept to Georgia's permissible remedial District 11, which uses the "connecting cable" of Interstate 85 to string together parts of 13 counties to form a district with a distinctive "urban/suburban flavor" and "a palpable community of interests." *Johnson v. Miller*, 922 F. Supp. 1556, 1564 (S.D. Ga. 1995), *aff'd sub nom., Abrams v. Johnson*, 521 U.S. 74 (1997).

[46] *See, e.g.*, J.S. 207a-09a.

weaves to "gobble in" African-American precincts, J.S. 24a-25a, simply ignores the fact that the district could just as readily be described as "wind[ing] and weaving to "gobble in" reliably loyal Democratic precincts in an area of the State that is surrounded by precincts that are predominantly Republican or only marginally Democratic.

The panel's dismissal of the improvements in the 1997 Plan, moreover, is inconsistent with the Court's treatment of changes to other remedial plans in prior cases. For instance, in *Lawyer,* the Court upheld a revised redistricting plan that retained a significant portion of the State's prior plan, even though the district was still irregular in shape and had a significant number of minority voters. 521 U.S. at 574, 577-81. Likewise, in *Wright v. Rockefeller*, 376 U.S. 52 (1964), the Court upheld a redistricting plan that contained four irregularly drawn districts because it recognized the geographic and demographic difficulties of designing districts in that area of the State. "Although the boundary lines were somewhat irregular, the majority reasoned, they *were not so bizarre as to permit of no other conclusion*." *Shaw*, 509 U.S. at 646 (discussing *Wright*) (emphasis added). The facts of this case compel the same conclusion.

D. The Panel's Reliance On Isolated Statements By Legislators That Establish, At Most, That Race Was Considered Does Not Establish That Race Predominated.

This Court has not hesitated to invalidate a lower court decision if the court draws an unreasonable and thus impermissible inference from the record. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984). Here, the lower court drew precisely such unreasonable inferences. The court took anecdotal evidence that legislators were aware of and had discussed race in designing District 12, and inferred a predominant racial motive. This inference was unreasonable in light of the record. *At most*, the evidence suggested that race

was *one* consideration among many in redistricting. Such evidence could thus not be used to establish that race was the "dominant and controlling" consideration, *Shaw II*, 517 U.S. at 905, in District 12's design, and that traditional redistricting criteria were subordinated. *See Miller*, 515 U.S. at 913.

As the uncontroverted evidence established, the goal of the legislature was to design districts that would maintain the partisan balance and protect incumbents. *See supra* note 6. Even the court conceded that these goals were faithfully pursued. *See* J.S. 11a (noting that the plan "reflects these directives"). Yet, from this comprehensive record of the legislative redistricting process, the district court plucked out three isolated statements from defendants, and erroneously construed them as supporting the predominant use of race.

The court first quotes a fragment of a statement by Senator Cooper on the floor of the Senate that the plan provides for a "racial and partisan balance" and uses that statement as evidence that the legislature intended to maintain the ten-two racial balance in the legislature. J.S. 27a. But this ignores the overwhelming thrust of Cooper's testimony: that the legislature sought to comply with the law by adhering principally to race-neutral principles, while ensuring that the redistricting plan was fair to minorities and gave them a "fair shot" at winning an election. J.A. 221-22 (quoting Cooper's testimony).

Moreover, the court omitted Cooper's reference to a "*geographical*" balance in the same phrase as "racial" and "partisan" balance. J.A. 221; *see also* J.A. 460 (Cooper noting that the overall the plan "provides for a fair geographic, racial and partisan balance throughout the State of North Carolina"). The reference to "racial" alongside "geographical" and "partisan" conveys, at most, that the legislature considered *each* of these factors in redistricting. It certainly does not demonstrate that race *trumped* political or geographical factors in the district's design. And since it cannot reasonably be

inferred that "geographical balance" means that the 1997 Plan allocated a specific number of districts based on geographic lines, there was no reason to assume – and plaintiffs did not conclusively demonstrate – that Cooper's reference to race had a numerical connotation.

The court's reliance on a second statement by Cooper during the Senate floor debate that strict scrutiny analysis may not be triggered because District 12 is not majority-minority was wholly beside the point. Cooper was merely reciting his understanding of the current state of equal protection law.[47]

Finally, the district court majority gave considerable weight to a hastily drafted e-mail to Cooper from Gerry Cohen, the legislature's computer technician. J.A. 369. The e-mail deals almost exclusively with details regarding shifts of precincts in District 1. Only the last line of the e-mail even purports to address District 12. The phrase that Cohen had "moved Greensboro Black community into the 12th and now need to take bout [*sic*] 60,000 out of 12th," *id.*, was merely a shorthand description for those sections of Greensboro that were added to the district – areas that were predominantly African-American *and* solidly Democratic. J.A. 629 (Cooper stating that he "already knew that the precincts that were in the predominantly black areas were heavily Democratic"). Surely an equal protection violation cannot turn on Cohen's failure to stick the word "Democratic" between "Greensboro" and "Black."[48]

---

[47] The Court recognized in *Lawyer* that "[t]he fact that [a challenged district] is not a majority-black district . . . supports" a decision not to subject that district to strict scrutiny. 521 U.S. at 581. In any event, Cooper's testimony that there was no motive within the legislature to keep the African-American percentage just below 50% is uncontradicted. J.A. 221.

[48] Obviously, in light of the extension of the district to Greensboro, other residents would have to be removed to maintain the population balance. Moreover, the e-mail was simply inaccurate: the changes to the plan referenced by the e-mail added 29 Guilford County precincts to District

Even putting these strands of evidence in their strongest light, these statements, at best, establish that racial considerations were *a* factor in Cooper's thinking – a fact the State readily admitted, J.A. 222, and this Court has found permissible. *See Bush*, 517 U.S. at 958-59 (plurality opinion); *see id.* at 993 (O'Connor, J., concurring). But it is unreasonable to infer racial predominance from these isolated fragments, which neither disprove the State's position that politics predominated the district's design nor establish that traditional redistricting criteria were subordinated. As Judge Thornburg aptly noted, these statements merely reinforce the fact that lawmakers "were conscious of race, aware of racial percentages, on notice of the potential constitutional implications of their actions, and generally very concerned with these and every other political and partisan consideration which affected whether or not the redistricting plan would pass." J.S. 47a-48a n.18.

This Court's holding in *Lynch v. Donnelly*, 465 U.S. 668 (1984), reviewing an Establishment Clause claim, is instructive. In reviewing a district court's determination that a city's inclusion of a crèche in a holiday display lacked a secular purpose, the Court held that the decision could not be sustained because the court drew the wrong inference from the evidence. *See id.* at 680 ("The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations.").[49] The same is true here: plaintiffs simply

12, of which 18 were majority white, and involved over 100,000 citizens, of whom about *50,000* were white. J.A. 264-65, 268.

[49] *See also Henry v. C.I.R*, 170 F.3d 1217, 1233 (9th Cir. 1999) (Tax Court drew "speculative" inferences from the record); *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1248-49 (11th Cir. 1998) (If "there is [no] evidence to support an inference of a causal link between . . . discriminatory animus and the decision to terminate [the] employment" the court will

have not shown that there was "no question" that race predominated the design of District 12.

III. RECOGNIZED CLAIM PRECLUSION RULES BARRED PLAINTIFFS FROM CHALLENGING DISTRICT 12.

The district court erred in even entertaining plaintiffs' challenge to the constitutionality of District 12; this challenge plainly was barred by claim preclusion. On remand from this Court's decision in *Shaw II*, the district court explicitly approved the 1997 Plan's reformation of District 12 "as a constitutionally adequate remedy." J.S. 320a. The plaintiffs in that case did not appeal that ruling. Because the two *Cromartie* plaintiffs residing in District 12 were in privity with the *Shaw* plaintiffs through "virtual representation," they were bound by the *Shaw* decision, and the district court should have dismissed this complaint. The *Shaw* and *Cromartie* plaintiffs merely sought to shop for a more favorable panel and to manipulate the federal court system to render meaningless the adverse result upholding the 1997 Plan in *Shaw*. This Court should reverse the district court and render unsuccessful plaintiffs' tactical maneuvering, which, if condoned, would make federal district courts' review of states' districting decisions judgments without finality.

A. The District Court In Shaw Entered a Final Judgment Holding the Revised District 12 Constitutional.

After holding District 12 unconstitutional in *Shaw II*, this Court remanded the case to the district court for an appropriate remedy. The *Shaw* plaintiffs then amended their complaint and added as plaintiffs Martin Cromartie, Thomas Chandler Muse and Glennes Dodge Weeks, all residents of District 1. J.S.

"disregard the court's ultimate finding of intentional discrimination based on that inference as clearly erroneous.").

283a. That same day, these three plaintiffs filed this separate action, represented by the same attorney who represented them in *Shaw*. With the consent of plaintiffs, all proceedings in this action were stayed pending completion of the *Shaw* litigation.

The General Assembly enacted the 1997 Plan and submitted it to the *Shaw* district court for approval. That court allowed Cromartie, Muse, and the other *Shaw* plaintiffs to raise constitutional challenges to the plan,[50] but they did not make use of that opportunity. Instead, seeking to present their challenge to a panel that they perceived as more favorable, the plaintiffs asked the court to "not approve or otherwise rule on the validity" of the new plan, and to "dismiss this action without prejudice to the right of any person having standing to maintain a separate action attacking [its] constitutionality." J.S. 308a. The state defendants opposed this effort to preserve the challenges to the 1997 Plan and to present them in this lawsuit.

Rejecting the plaintiffs' request that it decline to rule on the merits of District 12, the district court in *Shaw* ordered the 1997 Plan "APPROVED as having adequately remedied the specific constitutional violation respecting former congressional District 12." J.S. 312a. Plaintiffs filed no appeal from that order or the identically worded judgment filed three days later. *Shaw v. Hunt*, 92-202-CIV-5-BR, Judgment (E.D.N.C. September 15, 1997).

One month later, the district court dissolved the stay order in this case. On that same date, plaintiffs filed an amended complaint claiming that Districts 1 and 12 in the 1997 Plan, just approved by the district court in *Shaw*, were unconstitutional. The defendants argued that, under basic principles of claim

[50] The district court directed them to advise the court "whether they intend[ed] to claim that the [new] plan should not be approved by the court because it does not cure the constitutional defects in the former plan." *Shaw v. Hunt*, CA No. 92-202-CIV-5-BR, Order (E.D.N.C. June 9, 1997).

preclusion, the *Shaw* ruling barred the challenge. The district court rejected this argument, stating summarily that the "decision of the Shaw three-judge panel was not preclusive of the instant cause of action, as the panel was not presented with a continuing challenge to the redistricting plan." J.S. 2a-3a.

B. The Doctrine of Claim Preclusion Barred Plaintiffs' Successive Challenge to District 12.

Under the doctrine of claim preclusion, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981). *See also Allen v. McCurry*, 449 U.S. 90, 94 (1980) (both claim preclusion and issue preclusion "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication"); *Comm'r of Internal Rev. v. Sunnen*, 333 U.S. 591, 597 (1948) (citation omitted) (claim preclusion "rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations").

Plaintiffs' claim was thus barred because the validity of District 12, first in the 1992 Plan and then in the 1997 Plan, was the heart of the *Shaw* case previously litigated to judgment. The court below rejected the claim preclusion argument on the theory that the *Shaw* court "was not presented with a continuing challenge to the redistricting plan." J.S. 2a-3a. Presumably, it did so because the *Shaw* plaintiffs sought to avoid an unfavorable ruling by requesting that the *Shaw* court not rule on the validity of the 1997 Plan at all. J.S. 308a. But claim preclusion prevents relitigation not only of issues actually litigated in a prior action, but also of issues that could have been litigated by the plaintiffs. *See Federated Dep't Stores*, 452 U.S. at 398; 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §§ 4406, 4407 (2d ed. 1987) ("Wright & Miller").

The *Shaw* court rightly concluded that it was obliged to rule on the validity of the 1997 Plan's District 12, since it had been offered as a remedy for the constitutionally defective 1992 Plan. J.S. 319a. It therefore ruled explicitly that the 1997 Plan "adequately remedied the specific constitutional violation respecting former congressional District 12" identified in *Shaw II*. J.S. 312a. Though the court below may have disagreed with the judgment entered by the court in *Shaw*, that judgment had preclusive effect. *See Federated Dep't Stores*, 452 U.S. at 398 (*res judicata* not affected "by the fact that the judgment may have been wrong" or by "erroneous conclusion" of court in first case). Under the doctrine of claim preclusion, the final judgment in *Shaw* extinguished any claim that the *Shaw* plaintiffs and their privies had to litigate the validity of District 12.

Only two plaintiffs, J. H. Froelich, Jr. and R. O. Everett, were residents of District 12 with standing to challenge that district.[51] Although neither was a plaintiff in *Shaw*, both are bound by the *Shaw* judgment. Their close associations with lead counsel Robinson Everett, their awareness of the case and consultation with counsel, and the tactical maneuvering that brought them into this litigation as part of an effort to avoid the adverse *Shaw* decision, all bring them into privity with the *Shaw* plaintiffs through the rule of "virtual representation." *See* 18 Wright & Miller, *supra*, § 4457.

As this Court has noted, "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). The general rule that a person must have been a party to a prior

[51] Plaintiff Ronald Linville also tried to challenge revised District 12, but he is not a resident of the district. J.S. 341a. Although the majority of the district court treated the issue as moot, *see* J.S. 30a n.10, the reasons Linville should have been dismissed were fully discussed by Judge Thornburg in his dissenting and concurring opinion. *See* J.S. 64a-67a.

proceeding to be bound by it has a recognized exception "when . . . a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." *Id.* (citation omitted). Lower federal courts have frequently recognized that, under appropriate circumstances, a person whose interests are adequately represented may be deemed to be privity with prior litigants through "virtual representation," especially in cases involving broad issues of public law, rather than more individualized grievances. *See, e.g., NAACP, Minneapolis Branch v. Metro. Council*, 125 F.3d 1171 (8th Cir. 1997) (prior class action challenging segregated housing and related educational deficiencies bars subsequent action by school children who were not members of initial class), *cert. denied*, 525 U.S. 826 (1998); *Tyus v. Schoemehl*, 93 F.3d 449, 456 (8th Cir. 1996) (action challenging city alderman districts on constitutional and Voting Rights Act grounds barred by prior suit for plaintiffs who participated in prior suit and others allied with them); *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990) (action by state legislators challenging flying of confederate flag barred by prior judgment against different legislator raising similar claims); *Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (plaintiff parents and their children precluded from pursuing first amendment claims against school system and state officials because of participation by father and some of the children in similar prior suit); *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 750 F.2d 731, 741 (9th Cir. 1984) (entire class of black schoolchildren barred from litigating segregation claims identical to those in prior class action on grounds that overlapping plaintiffs in prior suit adequately represented current class, including children who were not members of initial class); *Petit v. City of Chicago*, 766 F. Supp. 607, 613 (N.D. Ill. 1991) (white police officers bound by prior suit brought by Department of Justice and intervening police officers challenging promotional examinations).

Privity through virtual representation applies when parties to the earlier suit – in this case, counsel Robinson Everett and

his co-plaintiffs in *Shaw* – are so closely aligned with the interests of the present parties as to be their virtual representatives. *Tyus*, 93 F.3d at 454. A necessary condition for preclusion by virtual representation is that there be an identity of interests such that the original litigants adequately represented the interests, or had the same incentive to pursue the interests, of the current plaintiffs. *See NAACP, Minneapolis Branch*, 125 F.3d at 1174; *Petit*, 766 F. Supp. at 611; *Los Angeles Branch NAACP*, 750 F.2d at 742-46. Here, lead counsel Robinson Everett, who was both a plaintiff and lead counsel in *Shaw*, had the same incentive to litigate the validity of District 12 in *Shaw* that he has pursued in this case as counsel through plaintiffs Froelich and Everett, his first cousin. Before the remedial proceedings in 1997, Everett had already devoted five years of litigation to the cause of having District 12 deemed invalid; immediately after the remedial proceedings, he filed this suit to try his case again. There is no reason why the same interests and incentives would not have guided his strategy in the remedial proceedings themselves.

When the necessary identity of interests exists, courts applying claim preclusion through virtual representation consider additional factors, including "'participation in the first litigation, apparent consent to be bound, apparent tactical maneuvering, [and] close relationships between the parties and nonparties.'" *Jaffree*, 837 F.2d at 1467 (quoting 18 Wright & Miller, *supra*, § 4457 at 494-99). Those factors favor a finding of virtual representation in this case.

Plaintiff Everett knew his cousin was litigating *Shaw* and joined the suit when his cousin "said that he needed to start over." "He called me and said he needed a plaintiff in Rowan County." J.S. 331a-34a. Plaintiff Froelich had been in business with both attorney Everett and his mother. Froelich knew about *Shaw* while it was pending, discussed it with his old friend, told Everett he was willing to be a plaintiff, and even filed a declaration in *Shaw*. J.S. 335a-37a; J.A. 672-678. Thus, these

plaintiffs were fully on notice of *Shaw*, followed it throughout, communicated with *Shaw* counsel, and became parties only when counsel decided he needed new plaintiffs.[52]

Especially important to this analysis is the tactical maneuvering of the *Cromartie-Shaw* plaintiffs in their efforts to rejuvenate their challenge to the congressional districting plan. Significantly, Cromartie and Muse also were plaintiffs in *Shaw* while it was on remand from this Court's decision in *Shaw II*. They were thus among the *Shaw* plaintiffs who urged the district court not to rule on the merits of the 1997 Plan, apparently for the sole purpose of pursuing the case in a different forum in hope of a more favorable result.

These close affiliations and overlapping of plaintiffs and counsel along with the tactical maneuvering require the application of claim preclusion.[53] Otherwise, "it would allow various members of a coordinated group to bring separate lawsuits in the hope that one member of the group would eventually be successful, benefiting the entire group." *Tyus*, 93 F.3d at 457. *See also Petit*, 766 F. Supp. at 612-13; *Louisiana*

---

[52] In *Richards*, the Court relied on the *absence* of these same factors to hold that nonparties to an initial suit were not precluded by the judgment in that case. *See* 517 U.S. at 802 (parties to two cases described as "mere strangers" to one another); *id.* at 805 (plaintiffs "received neither notice of, nor sufficient representation in," the prior litigation). Decided on these very different facts, *Richards* is not in any way inconsistent with application of the "virtual representation" doctrine in this case.

[53] The mere fact that the same counsel represented the *Shaw* plaintiffs and represents the *Cromartie* plaintiffs is not, of course, controlling. *See S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999). However, it is one thing for successive plaintiffs not claimed to be in privity to hire the same attorney in a matter in which he is experienced. It is a different matter altogether for the same attorney to be counsel to successive plaintiffs when the attorney also was a plaintiff in the first suit and solicits his cousin and business associate as plaintiffs in the second suit and when that attorney engages in tactical maneuvering to try to renew the case in a more promising posture. *See Tyus*, 93 F.3d at 459 (Henley, J., concurring).

Seafood Mgmt. v. Foster, 53 F. Supp. 2d 872, 884 (E.D. La. 1999). If claim preclusion does not apply in a case like this, then attorney Everett or any similarly invested attorney will be able to bring the same suit over and over, recruiting new plaintiffs, until he prevails. Interested persons like plaintiffs Everett and Froelich will be able to await the results of the first, second, or even third case and then pursue the same claim again.

Redistricting challenges are the type of public law claims that are particularly appropriate for claim preclusion based on privity through virtual representation. In this case, plaintiffs Froelich and Everett have not claimed they were denied the right to cast their individual votes. *See Tyus*, 93 F.3d at 457. Instead, they asserted they had been harmed as a result of their residence in the congressional district, a harm shared under this Court's decisions with more than 550,000 other persons.[54] *See United States v. Hays*, 515 U.S. 737, 745 (1995); *see also Shaw II*, 517 U.S. at 904. If claim preclusion does not apply in a case like this, then plaintiffs in later suits may sit back and await the judgment in the first case, knowing they will benefit from a favorable judgment and having no incentive to intervene. *See Petit*, 766 F. Supp. at 613; *Tyus*, 93 F.3d at 456. To allow such successive suits would "discourage the principles and policies the doctrine of res judicata was designed to promote" – the principles of finality of litigation and limiting persons to a single "bite at the apple." *See Petit*, 766 F. Supp. at 613.

Because plaintiffs "raise an issue of public law" that otherwise would encourage "fence-sitting," this is precisely the type of case for which claim preclusion by virtual representation is appropriate and, indeed, essential. *See Tyus*, 93 F.3d at 457 (applying claim preclusion through virtual

[54] This Court noted a similar distinction for claim preclusion purposes between the type of private taxpayer suit it addressed in *Richards* and more generalized taxpayer actions for which claim preclusion would be more freely available. *Richards*, 517 U.S. at 803.

representation to vote dilution claims under Section 2 of the Voting Rights Act of 1965 and the United States Constitution). Thus, school desegregation claims by school children not part of the plaintiff class in a prior lawsuit were barred in part because, absent privity through virtual representation, "those claims would assume immortality." *Los Angeles Branch NAACP*, 750 F.2d at 741. Particularly in public law suits such as this, where the harms are more generalized and the potential plaintiffs number in the hundreds of thousands, groups of affiliated persons should not be allowed to bring successive lawsuits free of claim preclusion restrictions. The district court's failure to recognize that claim preclusion barred plaintiffs' District 12 challenge led to the court's unwarranted intrusion into the State of North Carolina's sovereign responsibility to determine its congressional districts and disrupted the electoral process repeatedly and unnecessarily. The district court's decision requires reversal.[55]

[55] As a remedy for its conclusion that the 1997 Plan is unconstitutional, the district court ordered that the State adopt a new districting plan in time for the imminent 2000 election. This Court stayed that order, and it is now likely that the 2000 election will have been held before this Court issues its decision in this case. If the Court affirms the judgment below, the State respectfully requests that the Court vacate the district court's remedial order, and require only that the State adopt a new plan for the 2002 election. This Court has repeatedly allowed elections to proceed even under concededly invalid districting plans and required no new elections to be held when "equitable considerations" such as the disruption to the legislative process and the lack of ample time to enact a new plan require it. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). *See Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 655 (1964); *Roman v. Sincock*, 377 U.S. 695, 711-12 (1964); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 739 (1964). Anticipating that, if the judgment below is affirmed after the 2000 election has been conducted, the plaintiffs are likely to seek an order from the district court setting aside the results of that election and requiring an interim congressional election, the State asks that the Court make clear that any relief accorded the plaintiffs as a result of an affirmance does not include requiring the State to hold an interim election for members of Congress prior to the 2002 election.

CONCLUSION

For the reasons stated, this court should reverse the district court's ruling and remand for entry of judgment for the State. defendants.

Respectfully submitted,

MICHAEL F. EASLEY
North Carolina Attorney General

Tiare B. Smiley*
Special Deputy Attorney General

Norma S. Harrell
Special Deputy Attorney General

Walter E. Dellinger
O'Melveny & Myers LLP

Brian D. Boyle
O'Melveny & Myers LLP

Crystal Nix Hines
O'Melveny & Myers LLP

Jonathan D. Hacker
O'Melveny & Myers LLP

September 8, 2000

* Counsel of Record

INDEX OF APPENDICES

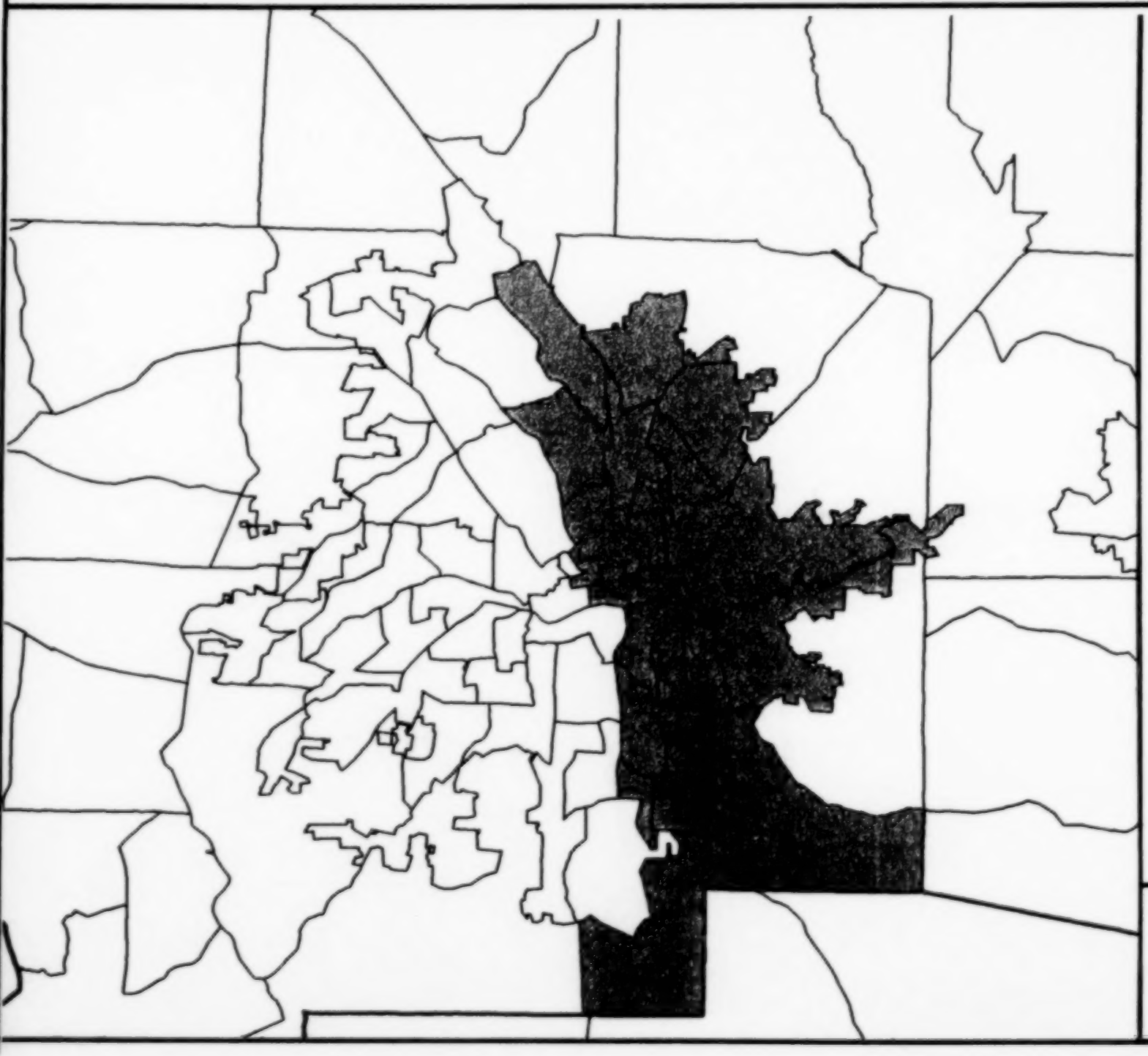
Precinct Registration Maps

Forsyth County District 12 Precincts 1a

Guilford County District 12 Precincts..... 2a

Mecklenburg County District 12 Precincts 3a

Forsyth County District 12 Precincts

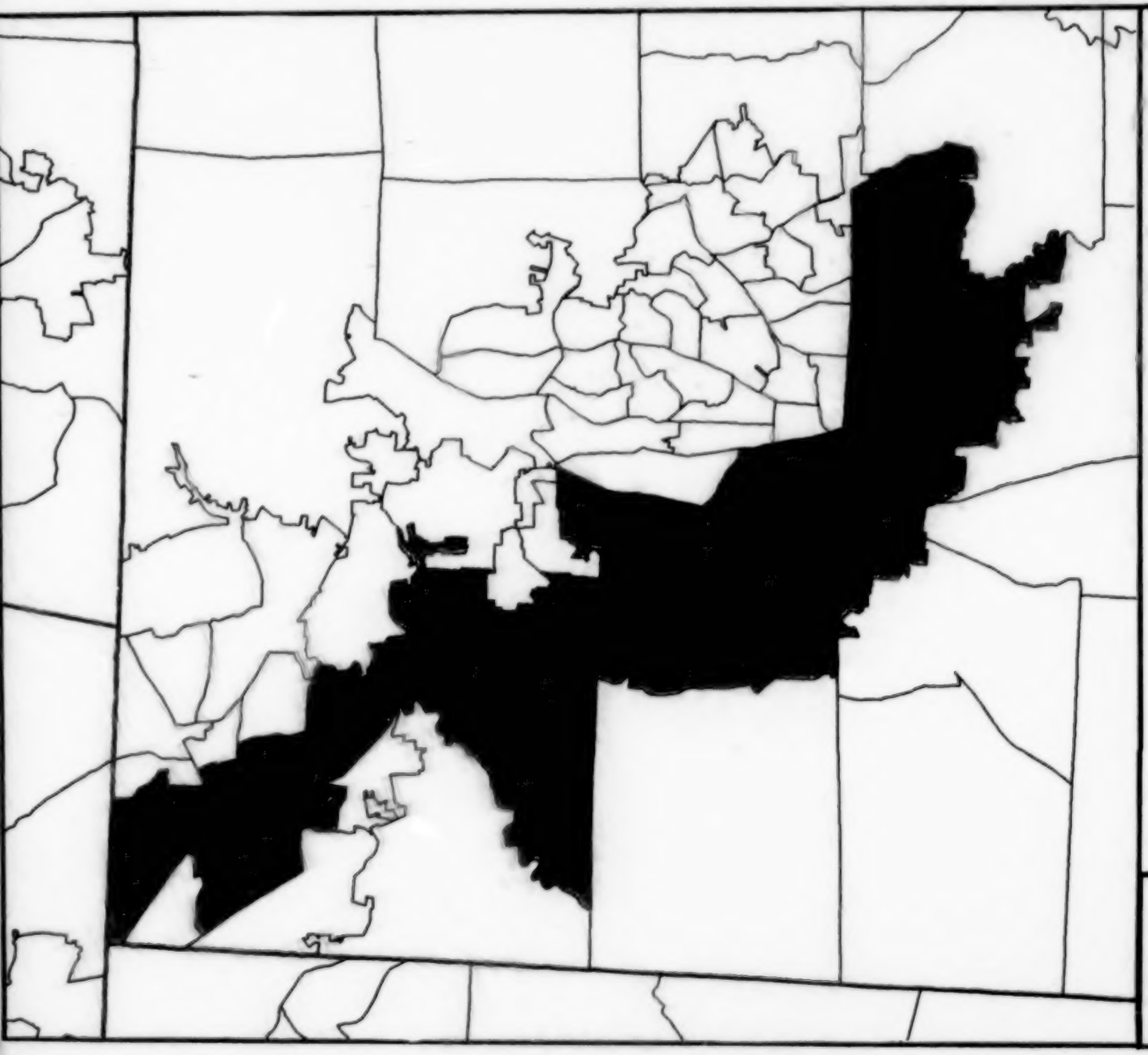


Legend

- County Boundary
- Precinct Boundary
- District Boundary
- District 12
- District 12 Precincts With Lower Democratic Registration Than One Or More Adjacent Non-District 12 Precincts

N.C. General Assembly,
Information Systems Division

Guilford County District 12 Precincts

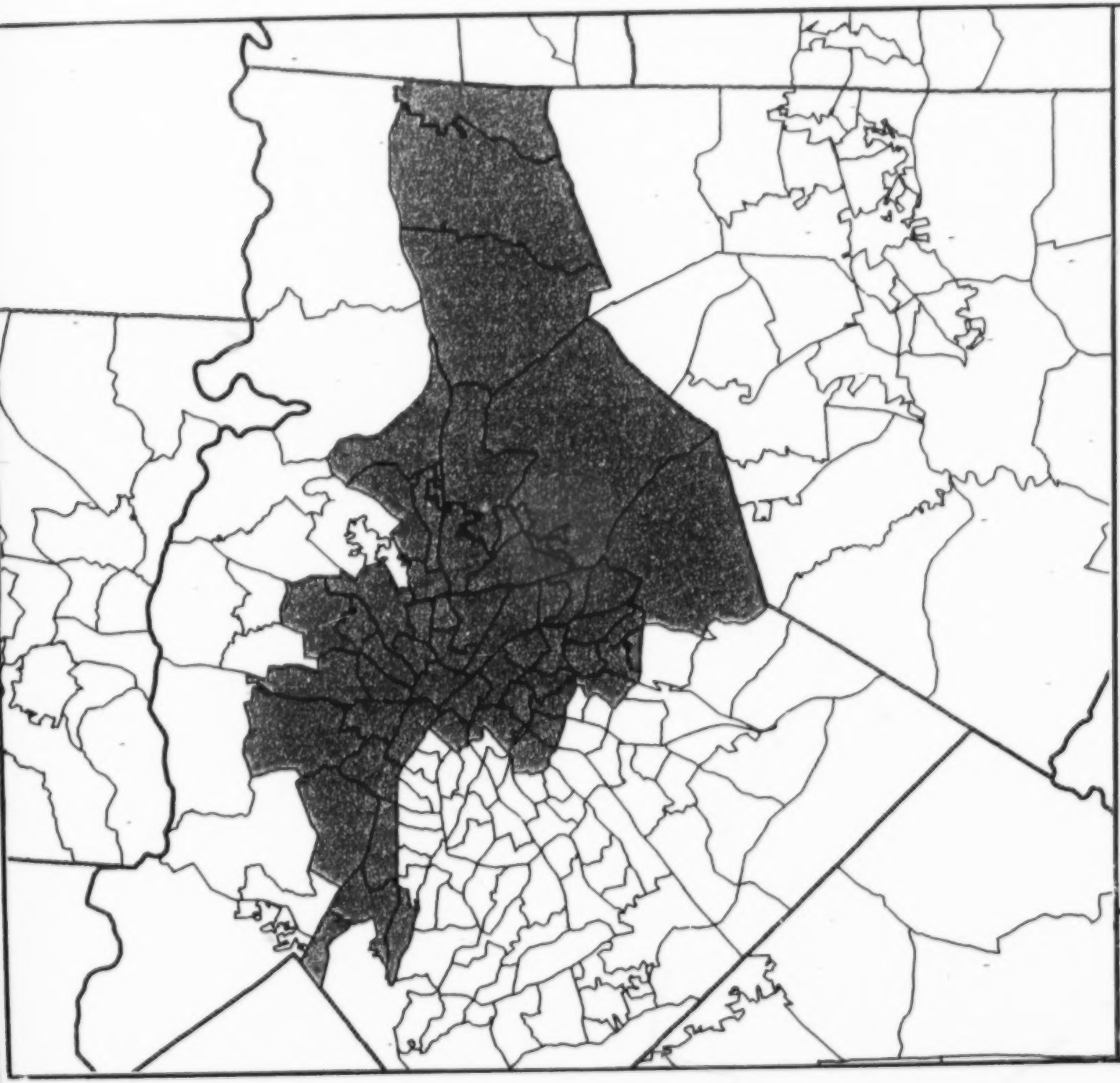


Legend

- County Boundary
- Precinct Boundary
- District Boundary
- District 12
- District 12 Precincts With Lower Democratic Registration Than One Or More Adjacent Non-District 12 Precincts

N.C. General Assembly,
Information Systems Division

Mecklenburg County District 12 Precincts



Legend

- County Boundary
- Precinct Boundary
- District Boundary
- District 12
- District 12 Precincts With Lower Democratic Registration Than One Or More Adjacent Non-District 12 Precincts

N.C. General Assembly,
Information Systems Division

(8) (8)

Nos. 99-1864 and 99-1865

Supreme Court, U.S.
FILED
OCT - 6 2000
CLERK

In the

Supreme Court of the United States

JAMES B. HUNT, JR. In his official capacity as Governor of the State of North Carolina, *et al.*

Appellants,

and

ALFRED SMALLWOOD, *et al.*

Appellant-Intervenors

v.

MARTIN CROMARTIE, *et al.*

Appellees.

On Appeal from the United States District Court Eastern District of North Carolina

APPELLEES' BRIEF ON THE MERITS

ROBINSON O. EVERETT
(Counsel of Record)
SETH A. NEYHART
EVERETT & EVERETT
P.O. Box 586
Durham, NC 27702
(919) 682-5691

MARTIN B. McGEE
WILLIAMS, BOGER,
GRADY, DAVIS & TUTTLE
708 McClain Rd.
Kannapolis, NC 28081
(704) 932-3157

DOUGLAS E. MARKHAM
P.O. Box 130923
Houston, TX 77219-0923
(713) 655-8700

BEST AVAILABLE COPY

13 pp+f/00

QUESTIONS PRESENTED

1. Whether the District Court had a basis in circumstantial or direct evidence to find that the North Carolina General Assembly had subordinated traditional redistricting principles and created a Twelfth District that was predominantly motivated by race.

2. Whether the District Court properly concluded that Appellants and Appellant-Intervenors had failed to raise any valid claim that the Twelfth District was narrowly tailored to fulfill a compelling governmental interest.

3. Whether the District Court properly rejected Appellants' unfounded defense of claim preclusion.

4. Whether the District Court had discretion to enjoin the continuing use of an unconstitutional congressional district that perpetuated prior racial gerrymandering.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 9

I. RACE PREDOMINATED OVER TRADITIONAL REDISTRICTING PRINCIPLES IN DISTRICT 12 OF THE 1997 NORTH CAROLINA CONGRESSIONAL REDISTRICTING PLAN 9

A. The District Court correctly perceived its responsibility on remand 9

B. Circumstantial evidence supports the District Court's finding that race predominated over traditional redistricting principles in the creation of the Twelfth District 14

C. Direct Evidence also supports the District Court's finding that race predominated 33

D. The context of this case is relevant to the issues of predominantly race based motive and credibility 47

II. NO COMPELLING GOVERNMENTAL INTEREST EXISTS FOR THE 1997 PLAN'S TWELFTH DISTRICT 50

III. APPELLANTS' DEFENSE OF CLAIM PRECLUSION LACKS MERIT 53

IV. THE DISTRICT COURT ACTED WELL WITHIN ITS EQUITABLE DISCRETION 54

CONCLUSION 56

TABLE OF AUTHORITIES

Page(s)

CASES:

Abrams v. Johnson, 521 U.S. 74 (1997) 5, 16, 42

Anderson v. City of Bessemer, 470 U.S. 564 (1985) 13

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) 56

Bush v. Vera, 517 U.S. 952 (1996) ..... *passim*

Commissioner v. Duberstein, 363 U.S. 278 (1960) 13

Cromwell v. County of Sac., 94 U.S. 351 (1876) 53

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) 32

FDIC v. Majalis, 15 F.3d 1314 (5th Cir. 1994) 51

Federated Dept. Stores, Inc. v. Moite, 452 U.S. 394 (1981) 53

Garza v. County of Los Angeles Bd. of Supervisors, 918 F.2d 763 (9th Cir. 1990) 45

Hays v. Louisiana, 936 F. Supp. 360 (W.D. La. 1996) (three-judge court), *appeal dismissed as moot, Louisiana v. Hays*, 518 U.S. 1014 (1996) . 19, 20, 42, 43

Hunt v. Cromartie, 526 U.S. 541 (1999) ..... *passim*

Icicle Seafoods v. Worthington, 475 U.S. 709 (1986) 14

Page(s)

Jeffers v. Clinton, 756 F.Supp. 1195 (D. Ark. 1990) (three-judge court), *aff'd*, 498 U. S. 1019 (1991) ... 45

Johnson v. Miller, 929 F.Supp. 1529 (S.D. Ga. 1996) (three-judge court) 36

Karcher v. Daggett, 466 U.S. 910 (1984) 56

Keyes v. School District No. 1, 413 U.S. 189 (1973) 5

Kelley v. Bennett, 96 F.Supp.2d 1301 (M.D. Ala. 2000) (three-judge court), *appeal docketed*, No. 00-132 (U.S. July 24, 2000) 36

Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984) 45

Lawyer v. Department of Justice, 521 U.S. 567 (1997) 10, 17, 29, 36

Lemon v. Kurtzman, 411 U.S. 192 (1973) 56

McQueeney v. Wilmington Trust Co., 770 F.2d 916 (3rd Cir. 1985) 12, 39

Miller v. Johnson, 515 U.S. 900 (1995) ..... *passim*

Perkins v. Matthews, 400 U.S. 379 (1971) 56

Reeves v. Sanderson Plumbing Products, Inc., ___ U.S. ___, 20 S.Ct. 2097 (2000) 11, 39

Reynolds v. Sims; 377 U.S. 533 (1964) 55

Rybicki v. State Bd. Of Elections, 574 F.Supp. 1082 (N.D. Ill. 1982) (three-judge court) 45

Page(s)

Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd, Shaw v. Hunt*, 517 U.S. 899 (1996) 46

Shaw v. Hunt, 517 U.S. 899 (1996) ..... *passim*

Shaw v. Reno, 509 U.S. 630 (1993) ..... *passim*

Smith v. Beasley, 946 F.Supp. 1174 (D.S.C. 1996) (three-judge court) 36

Terrazas v. Clements, 581 F.Supp. 1329 (W.D.Tex. 1984) (three-judge court) 45

Thornburg v. Gingles, 478 U.S. 306 (1986) 52

United States v. Hays, 515 U.S. 737 (1995) 54

United States v. Yellow Cab Co., 338 U.S. 338 (1949) ... 11

Vera v. Bush, 933 F.Supp. 1341 (S.D. Tex. 1996) (three-judge court), *stay denied sub nom. Bentsen v. Vera*, 518 U.S. 1048 (1996) 9, 55

Vera v. Richards, 861 F.Supp. 1304 (S.D. Tex. 1995) (three-judge court), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996) 44

Wise v. Lipscomb, 437 U.S. 535 (1978) 10

Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986) .. 51, 52

Page(s)

STATUTES:

42 U.S.C. § 1973 (1994) 4, 52

N.C. Gen. Stat. § 163-210(b) (1999) 19

N.C. Gen. Stat. § 163-111 (1999) 26

SECONDARY AUTHORITIES:

John Hart Ely, *Standing to Challenge Pro-Minority Gerrymandering*, 111 HARV. L. REV. 576 (1997) ... 28

Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993) 16

COUNTERSTATEMENT OF THE CASE

After a legal struggle spanning more than four years and involving two appeals, the Court finally laid to rest the bizarre Twelfth District created by North Carolina's 1992 redistricting plan. *See Shaw v. Hunt*, 517 U.S. 899 (1996). Three weeks later, Martin Cromartie and two other registered voters in the First Congressional District filed suit to have that District declared unconstitutional.[1] Judge Malcolm J. Howard, to whom *Cromartie* had been assigned, entered a stay order by consent to await the outcome of remedial proceedings in the *Shaw* litigation. Thereafter, by further consent, he extended the stay from time to time over several months.

On April 1, 1997, the General Assembly submitted a new redistricting plan to the *Shaw* district court for review. Under this plan, none of the *Shaw* plaintiffs, all of whom lived in Durham, had standing to challenge the new Twelfth District because it no longer extended to Durham County. On September 12, 1997, that court filed a final order approving use of the 1997 redistricting plan.[2]

---

[1]The same day, July 3, 1996, a separate and unrelated group of plaintiffs led by Jack Daly filed a complaint in *Daly v. High* in order to challenge not only North Carolina's Congressional Redistricting Plan, but also its legislative apportionment plan. No. 5: 97-CV-750-BO (E.D.N.C.).

[2]Emphasizing the restricted nature of its action, the district court stated:

> "We close by noting the limited basis of the approval of the plan that we are empowered to give in the context of this litigation. It is limited by the dimensions of this civil action as that is defined by the parties and the claim properly before us. Here, that means that we only approve the plan as an adequate

On October 10, 1997, after the termination of the *Shaw* litigation, the *Cromartie* plaintiffs filed an "Amended Complaint and Motion for Preliminary and Permanent Injunction." This amended complaint included as plaintiffs not only the original plaintiffs from the First District, but also other plaintiffs registered as voters in the new Twelfth District. On October 14, 1997, the State moved to have the *Shaw* panel consolidate and consider *Cromartie* and *Daly v. High*. The *Shaw* panel denied the State's motion on October 16, 1997, Jt. App. at 791-804, and the State made no appeal.

On January 15, 1998, the *Cromartie* case was reassigned from Judge Howard to a three-judge panel comprised of Circuit Judge Samuel J. Ervin III, Judge Terrence W. Boyle and Judge Richard L. Voorhees. This panel already had *Daly* before it. Jt. App. at 511. On January 30, 1998, the *Cromartie* plaintiffs, renewing the prayer for relief contained in their amended complaint, moved for a preliminary injunction. On February 5, 1998, they moved for summary judgment. On March 3, 1998, defendants responded with a cross-motion for summary judgment. The district court granted plaintiffs' motions for summary judgment and for a preliminary and permanent injunction on April 3, 1998, and the Appellants unsuccessfully requested a stay from the district court and this Court.

The 1998 congressional elections proceeded with a less racially constructed Twelfth District under the new plan adopted by the North Carolina General Assembly. Instead of

---

remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not - cannot - run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12."

Appellants' J.S. App. at 320a.

the 47% African-American population in the 1997 Plan, the Twelfth District in the 1998 Plan had a 35% African-American population. Moreover, unlike the 1997 Plan in which the Twelfth District divided all six of its counties and split all four of its major cities as well as various towns, the Twelfth District of the 1998 Plan contained five counties - one of which it left intact - and split only two major cities, Charlotte and Winston-Salem.

Meanwhile, the State pressed forward with its appeal as to the 1997 plan, whose use had been prohibited in any future election.[3] After the Court noted probable jurisdiction of the appeal by Appellants and Appellant-Intervenors, oral argument was heard on January 20, 1999. The Court's opinion, handed down on May 17, 1999, discussed the evidence and held that the State had raised an issue of fact as to whether a racial motive predominated in drawing the Twelfth District. Accordingly, the Court reversed the summary judgment previously entered for Appellants and remanded the case for trial. *See Hunt v. Cromartie*, 526 U.S. 541, 553-554 (1999).

In preparation for trial, the parties engaged in extensive discovery and entered into a seventy-five-page pretrial order containing eighty-two stipulations, presenting more than three hundred fifty exhibits (including more than 225 maps), and more than 1100 pages of deposition designations to be used in lieu of, or to supplement, the testimony in court. After the untimely death of Judge Ervin, District Judge Lacy H. Thornburg was assigned to the panel as Circuit Judge Designate. He later presided at the trial, which took place from November 29, 1999, until December 1, 1999, and in which the

---

[3]The legislation enacting the 1998 Plan contained a provision that North Carolina would revert to the 1997 Plan if this Court rendered a favorable decision on the State's appeal of the summary judgment. *See Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999).

plaintiffs called eight witnesses to testify and the defendants called four.

On March 7, 2000, the district court delivered its opinion holding that when the General Assembly created the 1997 Plan's First and Twelfth Districts, race had predominated over traditional redistricting principles. The district court also found that "no evidence of a compelling state interest in utilizing race to create the new 12th District has been presented." Appellants' J.S. App. at 29a. On the other hand, the district court decided that the First District survived strict scrutiny because it fulfilled the State's compelling interest in avoiding possible liability under Section 2 of the Voting Rights Act. *See* 42 U.S.C. § 1973.

Appellants filed notice of appeal on March 10, 2000, and also requested a stay from the three-judge panel. The district court denied this request on March 13, 2000. Appellants' application to this Court for a stay was granted on March 16, 2000. The Court noted probable jurisdiction on June 26, 2000, and scheduled briefings on the merits.

SUMMARY OF THE ARGUMENT

In reversing the summary judgment rendered for plaintiffs, the Court concluded that the defendants had raised an issue of fact - whether the General Assembly's predominant motive was racial. Therefore, the Court remanded the case with the comment that "the District Court is more familiar with the evidence than this Court, and is likewise better suited to assess the General Assembly's motivations." *Hunt v. Cromartie,* 526 U.S. 541, 553-554 (1999).

Upon remand, the district court performed its assigned duty to determine the legislature's predominant motive in drawing the 1997 Plan. While acknowledging that the court should not interfere with the legislature's discretion, Appellants' Jt. App. at 21a, District Judge Boyle's opinion

emphasizes that federal courts must enforce the right to equal protection and other constitutional guarantees. *Id.* at 22a n.7. While the district court placed the burden of proof on the plaintiffs by a preponderance of the evidence, it correctly recognized that this burden could be satisfied by either circumstantial evidence or direct evidence. *Cf. Miller v. Johnson*, 515 U.S. 900, 916 (1995). The district court declined to create any presumption against defendants, despite the unconstitutionality of two districts in the predecessor 1992 Plan.[4]

The district court observed the witnesses and evaluated their credibility. For example, it properly deemed "not credible" an explanation offered by Senator Roy Cooper, the chairman of the Senate Redistricting Committee when the 1997 and 1998 plans were passed. Appellants' J.S. App. at 27a. Contradictions in Cooper's various statements amply justified this evaluation.

Because the Court usually does not review lower court factual determinations, Appellants and Appellant-Intervenors have sought unsuccessfully to manufacture issues of law for review. Thus, they have minimized the irregularity and bizarreness of the "new" Twelfth District and its significant differences from other Congressional districts in the 1997 North Carolina redistricting plan, as well as its differences from such

---

[4]An unconstitutional district is an "improper departure point" to follow when drawing a new district. *Abrams v. Johnson*, 521 U.S. 74, 90 (1997). By disregarding the circumstance that the racially gerrymandered Twelfth District of the 1992 Plan was the "core" for the corresponding district of the 1997 Plan, the district court may have granted unwarranted discretion to the General Assembly. *Cf. Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973) (the Court shifting the burden of proof to the government to show that its past segregative acts did not create or contribute to the current segregated condition of the core city schools).

districts in other states.[5] Likewise, Appellants disregard the splitting of political subdivisions along racial lines and describe the Twelfth District in misleading terms.

Geographic and demographic data concerning the Twelfth District require little analysis to sustain the finding that the legislature's predominant motive was race-based. Moreover, the comprehensive analysis of that data by an experienced and widely recognized expert on redistricting reinforces that finding by the court below. The majority properly accepted Dr. Weber's testimony and gave no weight to that of Dr. Peterson, who had never testified before in a redistricting case, whose methodology had never been used by others, and whose conclusions appear on their face to be unsupported and of little relevance. In their criticism of the district court's use of registration data, Appellants ignore the relationship of the registration data to the nomination of candidates in the primaries. Because of that relationship, there is an incentive to "pack" African-Americans into an already safe Democratic district in order to assure that the nominee will be black. This occurred with the Twelfth District.

Direct evidence supplements the circumstantial evidence presented at trial. The *post hoc* affidavits by Senator Cooper and Representative McMahan, their testimony at trial considered in the light of their cross-examination, and their statements in the legislative record revealed a predominant race

---

[5]For example, unlike other districts in North Carolina the Twelfth District splits all of its counties, and its creation required the relocation of a much higher percentage of whites than African-Americans. Among congressional districts in the United States, North Carolina's Twelfth District ranks in the bottom 1% in compactness.

based motive.[6] Likewise, the disparity between certain announced goals of the redistricting plan and the Twelfth District's actual features reflects the racial motive.

The plaintiffs offered sworn testimony by three disinterested legislators - Senator Horton, Speaker *pro tem.* Wood, and Representative Weatherly - that the General Assembly's motive had been predominantly racial. Their testimony is augmented by contemporaneous statements in the legislative record by Representative Michaux and Senator Blust, which support an inference as to the racial motive involved. Finally, testimony by plaintiffs' witnesses Neil Williams, R.O. Everett, and Jake Froelich also demonstrated how the counties of that Twelfth District had been split along racial lines.

Despite every effort by Appellants to minimize its importance, the E-mail sent on February 10, 1997 from Gerry Cohen to Senators Roy Cooper and Leslie Winner is a "smoking gun" which destroys their claims as to motive. *See* Jt. App. at 369. Gerry Cohen was the person who in 1991, 1992, 1997, and 1998 served as the primary draftsman at the redistricting computer.[7] Senator Leslie Winner worked closely with Cooper and Cohen to create the 1997 Plan. The E-mail reported Cohen's transfer of the "Greensboro Black community" into the Twelfth District. Jt. App. at 369. The language used in that E-mail makes clear that the predominant legislative motive for this transfer was racial and that pursuant to this motive a "significant number" of blacks were transferred

---

[6]These statements discussed "racial fairness," "the core," "racial balance," "functional compactness," and "triggering the test" (of *Shaw* if the district was more than 50% minority).

[7]Surprisingly, Senator Cooper could not remember receiving this E-mail, *see* Jt. App. at 216, although it arrived at a crucial moment and involved a major decision on his part.

into the Twelfth District and a "significant number" of whites were transferred out of the District.[8]

Although the majority in the district court made no reference to the 1998 Plan, the shape of the Twelfth District in that plan also confirms the predominant racial motive in the 1997 Plan. It demonstrates that a more compact, less racially gerrymandered Twelfth District could have been formed readily in 1997 and that this district would have been very safe for the Democratic candidate. However, the General Assembly rejected any such alternative and decided to include the "Greensboro Black community" in the Twelfth District.[9]

In view of the overwhelming weight of the evidence proving their predominant racial motive, Appellants and their allies raise some desperate defenses. First, they seek to argue claim preclusion even though the decision rendered by the *Shaw* panel in 1997 clearly intended to forestall any such argument, and all of the requirements for claim preclusion are lacking. Second, although neither they nor the Appellants raised the issue of strict scrutiny at trial, nor did they argue how

---

[8]The E-mail refers to moving 60,000 persons out, and a comparison of data from the two plans involved shows that those moved out were mostly white. This number is "significant" within the meaning of *Miller v. Johnson*. 515 U.S. 900, 916 (1995). The reference to percentages of African-Americans in the E-mail is very consistent with many statements in the record which led the district court to find that the legislators had a precise racial target for the Twelfth District of just under 50% African-American population - a target chosen because of their mistaken belief that thereby they could escape the restrictions of *Shaw v. Reno*. 509 U.S. 630 (1993).

[9]Likewise, when the 1997 Plan was first held unconstitutional by the district court and a less gerrymandered replacement plan was enacted, the General Assembly provided for reinstatement of the 1997 Plan. *See Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999).

the 1997 Plan's Twelfth District satisfied the strict scrutiny test, Appellant-Intervenors now press this claim for the first time. Finally, Appellant-Intervenors seem to contend that as early as March 2000, the district court was not free to enjoin use of a racially gerrymandered district which it found violated the Fourteenth Amendment. This contention is inconsistent with rulings in other racial gerrymander cases, such as *Vera v. Bush*, 933 F.Supp. 1341 (S.D. Tex. 1996)(three-judge court), *stay denied sub nom. Bentsen v. Vera*, 518 U.S. 1048 (1996), and also with the precedent established in this litigation.

ARGUMENT

I. RACE PREDOMINATED OVER TRADITIONAL DISTRICTING PRINCIPLES IN THE TWELFTH DISTRICT OF THE 1997 NORTH CAROLINA CONGRESSIONAL REDISTRICTING PLAN.

A. The District Court Correctly Perceived Its Responsibility on Remand.

In 1999, the Court remanded this case for a determination of the factual issue of predominant motive as to the formation of the Twelfth District of the 1997 North Carolina redistricting plan. *See Hunt v. Cromartie*, 526 U.S. 541 (1999). In her opening statement at trial, Appellants' lead counsel made clear their position that "[i]n District 12 we contend that race did not predominate." Jt. App. at 23. According to her, the State's defense of the Twelfth District was "purely a factual matter." *Id.* Appellees' counsel displayed no reluctance to assume the full burden of proof of establishing the predominance of race by the preponderance of

the evidence.[10]

After the trial, the district court found that the Twelfth District subordinated traditional districting principles to race. Appellants' J.S. App. at 28a-29a. In so finding, the district court recognized the principle that "electoral districting is a most delicate task," *id.* at 20a (quoting Miller v. Johnson, 515 U.S. 900, 905 (1995)), and stated that it was "cognizant of the principle that 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt.'" *Id.* at 21a (quoting Wise v. Lipscomb, 437 U.S. 535, 539 (1978)). Likewise, the district court recognized that its power "is limited except to the extent that the plan itself runs afoul of federal law." *Id.* at 22a (quoting Lawyer v. Department of Justice, 521 U.S. 567, 777 (1997)). Accordingly, in its judgment, the district court expressly refused to exceed its remedial powers and noted that the General Assembly could "consider traditional districting criteria, such as incumbency considerations, to the extent consistent with curing the constitutional defects." Appellants' J.S. App. at 29a-30a.

Contrary to the representations of Appellant-Intervenors in their brief, *see* Appellant-Intervenors' Brief at 26, the district court also took the view that "[a] comparison of the [unconstitutional] 1992 District 12 and the present District is of

---

[10] He submitted his view that, in light of the ruling in *Shaw* that the previous Twelfth District was unconstitutional, the defendants had the burden of showing that the earlier taint had been removed, but emphasized that plaintiffs did not rely on this argument because of the ample evidence they were offering of the predominant racial motive. Tr. at 20-21.

limited value here."[11] Appellants' J.S. App. at 24a. Thus, at every step the district court put the burden on Appellees to prove by either circumstantial or direct evidence "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 20a (quoting Miller, 515 U.S. at 916).

The history of the case - including the statements by Appellants' counsel at the beginning of trial - makes clear that the issues raised by Appellants were solely of fact and required weighing credibility. "Findings as to the design, motive, and intent with which men act" are peculiarly factual issues. *See United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949).[12]

---

[11] Such a comparison would seem quite relevant for the purpose of determining whether the unconstitutional taint of the 1992 version of the Twelfth District had been removed.

[12] In an attempt to increase the plaintiffs' burden of establishing predominant motive, Appellants appear to contend that Appellees were required to show not merely that a racial motive predominated, but also that the proffered motive of incumbency protection was pretextual. (*See* Appellants' Brief at 14-16.) Appellees would thus be required to prove that race was the only motive and not merely the predominant motive. This contention is incorrectly derived from some employment discrimination cases and is contrary to the Court's precedents on racial predominance. *See Shaw v. Hunt*, 517 U.S. 899, 907 n.3 (1996) (stating that dissent incorrectly read *Miller* as requiring that proffered race neutral explanations be shown to be pretextual).

Furthermore, the court below as factfinder found that the Appellants' key witnesses were "not credible" and "not reliable." This circumstance suffices under the employment discrimination cases to support the inference in this case that the Appellants had a predominant racial motive that they were seeking to conceal. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097, 2108 (2000) (citations omitted). " Such an inference is

Indeed, on the prior appeal, the Court emphasized that the district court was charged with determining whether a racial motive predominated. "[W]e are fully aware that the District Court is more familiar with the evidence than this Court, and is likewise better suited to assess the General Assembly's motivations." *Hunt v. Cromartie,* 526 U.S. 541, 553,554 (1999).

Ignoring the district court's clear statements to the contrary, Appellants ask in their first Question Presented whether a federal court may strike down a state's redistricting plan "without requiring the challengers to surmount their heavy burden of demonstrating that race, not politics, was the dominant and controlling rationale in drawing district lines and that traditional districting criteria were subordinated." Appellants' Brief at i. Appellants maintain without foundation that the district court failed to follow the law it cited, but instead, relied solely on evidence showing the mere awareness of race, *see, e.g.*, Appellants' Brief at 37-38, or alternatively, that race was only a motivating factor and not the predominant motive for creating District 12. *See id.* at 18 n.21.

However, while Appellants ask this Court for a "rigorous review of the record and decision below," Appellants' Brief at 16, their own presentation and review of the evidence actually before the district court is far less than "rigorous." Instead, Appellants systematically disregard, mischaracterize, and minimize the extensive evidence in the record revealing the General Assembly's predominant racial motive. Similarly, Appellant-Intervenors and the Solicitor General take misleading

---

consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Id. See also McQueeney v. Wilmington Trust Co.*, 770 F.2d 916, 921 (3rd Cir. 1985).

approaches to the evidence of racial motivation.[13]

Contrary to the confusion professed by Appellants as to the standard of review, Appellants' Brief at 18 n.21, the district court's finding of racial predominance is reviewed under the "clearly erroneous" standard. *See Miller v. Johnson*, 515 U.S. 900, 917 (1995). In light of the Court's observation on a far less developed record in *Hunt v. Cromartie* that "[r]easonable inferences from the undisputed facts can be drawn in favor of a racial motivation finding or in favor of a political motivation finding," 526 U.S. 541, 552 (1999), it is hard to see how the district court was "clearly erroneous" in finding the predominance of race from the vast amount of evidence before it at trial and with the opportunity to observe the witnesses.[14]

---

[13]For example, neither mentions the crucial factual finding as to the State's racial target of just under 50% in the formation of the 1997 Plan's Twelfth District. If the United States will not discuss the actual findings of fact that were made by the court below, it is hardly in a position to criticize that court for being "so sparse and conclusory as to give no revelation of what the District Court's concept of the determining facts and legal standard may be." U.S. Brief at 23 n.9 (quoting *Commissioner v. Duberstein*, 363 U.S. 278, 292 (1960)). Moreover, the Solicitor General mischaracterizes the cases it cites as standing for the proposition that "the district court's failure to exercise such care is itself grounds for reversal." *Id.* In fact, under those cases cited such failure is a ground for remand, not reversal. In this case, the district court's discussion of the evidence - in both majority and dissenting opinions - supplies the Court an adequate basis for deciding that the court below did not commit clear error in its finding of predominant racial motive.

[14]Under the clearly erroneous standard, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer,* 470 U.S. 564, 574 (1985) (citations omitted). "This is so even when the district court's findings do not rest on credibility determinations, but are based

In the case at bar, the district court correctly determined the issue this Court directed it to decide. Every racial gerrymandering case has a unique mix of facts and circumstances. Accordingly, Appellants' suggestion that the evidence in this case must be the same as that found in previous cases, Appellants' Brief at 18-21, is at odds with *Miller v. Johnson*. 515 U.S. 900, 915 (1995) (stating that "[t]he plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor" and that "parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness"). In this case, strong circumstantial and direct evidence in the record supports - indeed, compels - the finding of racial predominance.

B. Circumstantial evidence supports the District Court's finding that race predominated over traditional redistricting principles in the creation of the Twelfth District.

1. Traditional redistricting principles were subordinated to race.

In *Miller*, the Court stated that to show race

---

instead on physical or documentary evidence or inferences from other facts." *Id.* Nor can Appellants escape the force of the clear error standard by raising the specter of "mixed questions of law and fact." Appellants' J.S. Reply at 4. In mixed questions of law and fact, the actual historical facts necessary to a proper determination of the legal question are to be reviewed under the clear error standard. *See Icicle Seafoods v. Worthington*, 475 U.S. 709, 714 (1986). Thus, the district court's key preliminary findings are still subject to the clear error standard.

predominated in the construction of a district, "plaintiff[s] must prove that the legislature subordinated traditional race-neutral districting principles, including, but not limited to, compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." 515 U.S. at 916. The indisputable circumstantial evidence presented at trial shows that District 12 is one of the least compact congressional districts in the nation and that it is only one precinct wide in numerous parts of the district as it snakes between the predominately African-American areas. Appellees also proved at trial that District 12 utterly disregards political subdivisions and communities of interest as it aggregates African-American voters. In addition to racially dividing all six of its counties, the district also divides nine of its thirteen cities and towns, including the four largest, by race. It also combines dispersed African-American sections from different metropolitan areas that had not been together in a single congressional district in the two hundred years prior to the 1992 plan held unconstitutional in *Shaw v. Hunt*.

The African-American population in North Carolina is approximately 22% of the total population and is "relatively dispersed." *Shaw v. Reno*, 509 U.S. 630, 634 (1993). For example, the percentage of the African-Americans in the six counties split by the Twelfth District is 23.6%. Of these six counties, Guilford County has the highest percentage of African-Americans at 26.4%. *See* Jt. App. at 485. On the other hand, the Twelfth District's total African-American population is 46.67%. Because of the scattered residence of black persons across the Piedmont, this percentage can only be achieved by disregarding traditional North Carolina redistricting principles of compactness, and of keeping cities and counties whole. Thus, the "new"Twelfth District is "in many respects . . . almost the geographical monstrosity" that was its unconstitutional

predecessor. *Abrams v. Johnson*, 521 U.S. 74, 88 (1997) (rejecting the use of a district with features like those of a district previously adjudicated to be unconstitutional).[15] It subordinates traditional, race-neutral districting principles, and it subordinates them primarily to race.

a. The Twelfth District of the 1997 Plan ranks nationally in the bottom 1% of the nation's districts for compactness.

The Twelfth District of the 1997 plan is extremely noncompact - whether the test used is visual inspection or a mathematical formula. It remains in the bottom five congressional districts in the nation, ranking either 432 or 433 out of 435 in "perimeter compactness" and 430 or 431 in "dispersion compactness." Jt. App. at 107-08. The district court found that the Twelfth District's dispersion score of .109 and its perimeter score of .041 were both below the "low" compactness measures articulated in Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After*

---

[15] Appellants originally contended that they had cured the constitutional defects in the former plan by emphasizing the following factors in locating and shaping the new districts: (1) avoidance of the division of counties and precincts; (2) avoidance of long narrow corridors connecting concentrations of minority citizens; (3) geographic compactness; (4) functional compactness (grouping together citizens of like interests and needs); and (5) ease of communication among voters and their representatives. Jt. App. at 382; Appellants' J.S. App. at 83a. As is next discussed, the 1997 Twelfth District does not conform to any of these factors. The departure from Appellants' own stated criteria implies that they were spurious and justifies an inference of a predominantly race-based motive. Now, however, to fit better to their current litigation posture, Appellants have changed their list of factors allegedly employed by the General Assembly. *See* Appellants' Brief at 4. Appellant-Intervenors, however, are still citing the original list. Appellant-Intervenors' Brief at 9-10.

Shaw v. Reno, 92 MICH. L. REV. 483, 571-573, tbl.6 (1993). Appellants' J.S. App. at 16a. *Cf. Bush v. Vera*, 517 U.S. 952, 960 (1996) (O'Connor, J., plurality opinion) (finding this article to be "an instructive study"). The Twelfth District is dramatically less compact than the other districts in the North Carolina 1997 Plan. Furthermore, as the district court found, the Twelfth District was less compact than districts in other states that had previously been held unconstitutional. Appellants' J.S. App. at 26a.[16]

---

[16] Comparisons to other judicially invalidated districts, in states with different histories, population densities, local government units, and geographical features are necessarily limited in value. *Cf.* Appellants' Brief at 18-21. Comparisons to districts never challenged under *Shaw* theories are even less valuable. *Cf.* ACLU Brief at 16-17 (citing districts which are more compact and more regionally-based, most of which are located in a single metropolitan area, and composed of whole counties).

Appellants err in suggesting that District 11 in the court-ordered remedial plan for Georgia bears similarity to the 1997 version of District 12. (Appellants' Brief at 36 n.45; *See also* ACLU Brief at 15.) First, the Georgia district is comprised not of "parts of 13 counties" but of 12 entire, intact counties and only one split county. Second, it does not split small cities or large ones, either by race or by partisanship. Instead, it is a much more compact and rational district. *See* App. at 1a. In contrast, the North Carolina district not only fractures all of its cities and counties along racial lines, it does not even consistently follow I-85, which is the supposed similarity between the districts.

As for *Lawyer v. Department of Justice*, 521 U.S. 567 (1997), that case addressed a low income district included in a single metropolitan area, rather than a district which linked the African-American sections of a string of different cities. Furthermore, that state senatorial district was not constructed so that only an African-American would be elected, and it did not stand out as significantly more distorted than others in Florida, especially in view of Florida's irregular coastline. The Twelfth District of the 1997 Plan is significantly less compact than the other districts and is not in a single metropolitan area. Also, *Lawyer* did not involve a full trial, but rather a fairness hearing which "produced but two dissenters," who "neither presented relevant legal evidence nor

When the district's bizarre shape is combined with its demographics, the State's race-based purpose is revealed in the district's twists and turns as it narrows to the width of a single precinct at several points to avoid including white voters as it connects the dispersed African-American populations of Charlotte, Winston-Salem, Greensboro and the smaller towns in between. As the district court found, almost 75% of the total population in the Twelfth District came from mostly African-American portions of the three urban counties at the ends of the district. The parts of the three rural counties have "narrow corridors which pick up as many African-Americans as needed for the district to reach its ideal size." Appellants' J.S. App. at 12a; *see also* Jt. App. at 483. As the district court also found, "[t]he only clear thread woven throughout the districting process is that the border of the Twelfth District meanders to include nearly all the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro, inclusive." Appellants' J.S. App. at 25a. This is starkly depicted in a map of the region. Jt. App. at 483. As discussed below in connection with the division of cities and towns, the shape of the district more precisely correlates with the race of the district's voters than with their politics.

Finally, the 1997 Plan's Twelfth District can not be described as "functionally compact" unless the term is understood to mean that it links together concentrations of African-Americans. Significantly, in recent years the term has been used in just that way to seek to evade criticism that various racially gerrymandered districts lacked compactness. In fact, a witness proffered by Appellant-Intervenors in this case testified that the 1992 Twelfth District is *more* compact in the sense of "functional compactness" than the 1997 Twelfth

---

offered germane legal argument." *Id.* at 575 (citations omitted).

the sense of "functional compactness" than the 1997 Twelfth District, and the 1997 Twelfth District in turn is *more* compact than the 1998 Twelfth District. Jt. App. at 580. *Cf.* Jt. App. at 500-502. Similarly, Gerry Cohen, the draftsman of the 1992 and the 1997 Plans, testified in the *Shaw* trial that the racially gerrymandered First and Twelfth Districts were among the most compact in the 1992 Plan. Jt. App. at 812. Obviously, "functional compactness" is equated here with race. Appellees submit that the term "functional compactness" should be unequivocally rejected by the Court as a substitute for geographic compactness in *Shaw* cases.[17]

b. The Twelfth District of the 1997 Plan severely disrespects political subdivisions.

The Twelfth District is the only district in the 1997 plan which splits all of its counties, and it does so along racial lines.[18] This alone is a sharp contrast to past redistricting

---

[17]Another example of reversing the meaning of terms is provided in the Amicus Brief of the ACLU which claims that the Twelfth District is now the most "integrated" in the United States because its percentage of blacks and whites is now nearly equal. ACLU Brief at 2, 23. Following this logic, an eight room school would be "integrated" if it had four all-white classrooms and four African-American classrooms.

[18]Contrary to Appellants' assertion that only two precincts (existing in 1990) are split by the 1997 plan, Jt. App. at 382, the 1997 Twelfth District actually splits many (present day) precincts, *see* Tr. at 191, because of changes which occurred after the computer was loaded with its data in 1991. *See* N. C. Gen. Stat. § 163-210(b) (1999) at Ex. 219. However, even the use of whole precincts in the official computer database does not insulate a racially-constructed district from challenge. *See Shaw v. Hunt*, 517 U. S. 899, 932 n.7 (1996) (observing that the State in *Miller* had claimed to use whole precincts, "but the Court found that precinct lines had been relied on only because they happened to facilitate the State's effort to achieve a particular racial makeup"). *See also Hays*

traditions. *See* Jt. App. at 97-99; Ex. 288A and 289. As the District Court also noted, in further disregard of political subdivisions, the Twelfth District split its four cities and many towns along racial lines. Appellants' J.S. App. at 25a.[19]

In *Bush v. Vera*, even though there was some correlation between the Appellants' proffered race neutral explanations and the district lines, the plurality opinion found "no basis in the record for displacing the District Court's conclusion that race predominated over them, particularly in light of the court's findings that . . . they do not differentiate the district from surrounding areas . . . with the same degree of correlation to district lines that racial data exhibit." 517 U.S. 952, 966 (1996) (O'Connor, J., plurality opinion) (citations omitted). Furthermore, "[r]ace may predominate in the drawing of district lines because those lines are finely drawn to maximize the minority composition of the district, notwithstanding that in an overwhelmingly Democratic area, the total of Democrats in the district far exceeds its total minority population." *Id.* at 972 n.1.

The district court found that "where cities and counties are split between the Twelfth District and neighboring districts,

---

v. Louisiana, 936 F. Supp. 360, 368 (W.D. La. 1996) (three-judge court) (assignment of whole precincts by race violates Equal Protection), *appeal dismissed as moot*, *Louisiana v. Hays*, 518 U.S. 1014 (1996). Similarly, in North Carolina, the precincts have been drawn in a more racially segregated manner as a by-product of Voting Rights Act lawsuits in the state. *See* Jt. App. at 127-28.

[19]That this was no accident can be seen in the last minute fine tuning of District 12 described by legislative employee Linwood Jones to Rep. McMahan's House Redistricting Committee on March 25, 1997. "In Iredell we have gone into Statesville, which I believe picked up the minority percentage of District 12 - we came a little bit more out of Southern Rowan when we did that." Jt. App. at 460.

the splits invariably occur along racial, rather than political lines." Appellants' J.S. App. at 25a. This is true whichever of the four measures of "party affiliation" - registration or the voting results in three elections - is used.[20] While some correlation exists between party and the boundaries of the Twelfth District, this correlation does not achieve the same precise match that exists between the boundaries of the Twelfth District and the predominately African-American precincts. This can be seen by comparing the district-wide racial percentage map of the Twelfth District with the voting results maps of the Twelfth District for the 1988 Court of Appeals race and the 1990 Senate race, and with similar maps for individual counties.[21]

---

[20]In an effort to discredit the conclusions of the district court, the Solicitor General misrepresents the meaning of the term "party affiliation" and attempts to equate it with voter registration. U.S. Brief at 21. The term, as used regularly throughout the trial phase, refers to any of the "four different measures of party affiliation" contained within the database of the State's redistricting computers. Peterson Dep. at 19.

[21]In their first appeal, Appellants, exaggerating the difference between the registration data and voting performance data, alleged that "the disparity between party registration and voting behavior in North Carolina explains the shape and racial demographics of District 12." Brief on the Merits for Appellants at 31, *Hunt v. Cromartie*, 526 U.S. 541 (1999). *Accord*, Appellants' Brief at 23 ("undisputed", "uncontroverted"). In fact, as Dr. Weber later testified at trial and as the voluminous maps and data in the record show, an analysis of voting performance - especially in the urban Piedmont - is "very consistent" with a registration analysis. Jt. App. at 126. White Democrats in the Piedmont cities largely vote the way they register. *See* Stips. 54-61, Jt. App. at 17-20. *Cf.* Jt. App. at 483-484, 489-496. Also the State considered registration data in constructing this very plan. *See* McMahan Dep. at 88; Jones Dep. at 44, 80, 149; Ex. 31; *see also* Peterson Dep. at 82-83 (Dr. Peterson arguing against discounting "those analyses which include registration as a component").

In mixed motive cases, a boundary which corresponds more precisely to racial demographic data than partisan voting behavior is important evidence of a predominantly race-based district. *See Bush v. Vera,* 517 U.S. 952, 970-975 (1996) (O'Connor, J., plurality opinion). The voter performance data as well as the party registration figures establish that the boundary of the Twelfth District corresponds more precisely to racial demographic data than to partisan voting behavior data.

Thus, the district court's finding that splits occur along racial and not political lines is amply supported. Dr. Weber explained that when the data showing the political character of the split portions of the cities and counties, J.S. App. at 189a, 191a-92a, is compared with the data showing the racial character, Jt. App. at 323-25, 333-337, "[t]he racial differences are always greater than the partisan differences." Jt. App. at 84; *See also* Tr. at 265-69. A similar analysis of precinct assignment to District 12 for every precinct within the six affected counties showed a startling contrast between assignment correlated to race and correlated to the four measures of party affiliation. *See* Jt. App. 515. *Cf.* Appellants' Brief at 29, n.36 ("selected precincts"). A complete review of every precinct in each of the six counties, the racial character of each, and the assignment of each to a district revealed patterns showing racial assignment. *See* Jt. App. at 86-87, 111, 339-356. Even when the comparison is restricted to all precincts

---

Also on their first appeal, Appellants attached to their reply brief new maps which showed the Republican victories in only the precincts immediately outside the Twelfth District. *See* Appellants' J.S. App. at 213a, 217a, 221a. A more complete version of these maps is attached to Appellees' present brief. App. 2a-4a. On this appeal, subsequent to trial Appellants have once again prepared new maps which were not previously made available for evidentiary review by the district court. Appellants' Brief at 1a-3a. Appellees' objections to the authenticity of these new maps are detailed in the appendix to this brief. App. at 5a.

supporting a Democrat for office with, for example, 60 to 69.9% of the vote, the precincts in this set most likely to be assigned to the 12th District were the more heavily black ones. *Id.* at 87-88, 357-60. This "clear pattern" was constant for similar comparisons. *Id.* at 88, 101-03.

The closer adherence to racial populations than to political voting behavior is also shown by comparison of the maps of the racial demographics - both for the district and for the three major counties - with the mapped election results for the 1988 Court of Appeals contest and the 1990 U.S. Senate contest. *See id.* at 94-95. It can also be seen by a contrast of the maps at Jt. App. 483 to 489 and 493 (districtwide); 484 to 490 and 494 (Forsyth); Ex. 107 to Jt. App. 491 and 495 (Guilford); Ex. 109 to Ex. 257 and 267 (Mecklenburg); Ex. 240 to J.A. 492 and 496 (Iredell); Ex. 237 to Ex. 254 and 264 (Davidson); and Ex. 242 to Ex. 254 and 264 (Rowan). *See also* Jt. App. at 2a-4a (summarizing the above maps and the additional data on the 1988 Lt. Governor contest results reflected in the state's redistricting data set, *e.g.*, Ex. 21, 22, and 132.)

c. The Twelfth District of the 1997 Plan does not respect communities of interest or ease of communication.

The Twelfth District stretches from the metropolitan area of Charlotte to that of Winston-Salem and Greensboro. Thus it includes portions of two Standard Metropolitan Areas (SMAs) as well as parts of two television markets, several radio markets, and three newspaper circulation areas. *See* Jt. App. 100-01; Tr. at 193-96; Ex. 302, 303. The map of population density for North Carolina illustrates how District 12 consistently divides population centers. Jt. App. at 497. While the State has sometimes claimed the district unites "urban" populations, a casual review of the maps establishes that it only unites "urban black" populations, and uses "rural white"

connectors to do so. Significantly, while "urban" blacks are linked into one district, neighboring "urban" whites in the same six counties are placed in other congressional districts.[22]

In this respect, the linking of supposed communities of interest does not differ from that accomplished by the Twelfth District of the 1992 Plan. Indeed, the very testimony relied on by Judge Thornburg in his dissent, Appellants' J.S. App. at 53a-54a, and then cited by the Appellant-Intervenors, Appellant-Intervenors' Brief at 24, was testimony which had been originally presented to the *Shaw* court as a justification for the unconstitutional 1992 Twelfth District. *See* Ex. 100, North Carolina Section 5 Submission, 1997 Congressional Redistricting Plan, 97C-28F-3B. On cross-examination in the *Shaw* trial, Gerry Cohen, the draftsman of the 1992 and 1997 plans, admitted that when he spoke then of creating a "rural" Congressional District 1 and an "urban" Congressional District 12, he "meant a rural black and urban black" district. Jt. App. at 814.

Furthermore, the suggestion that all the connected Twelfth District voters (but apparently not their neighbors) share a link to Interstate 85 is also misleading. The district's actual path meanders from Charlotte up I-77, then leaves I-77

---

[22]For example, Mecklenburg County is the state's most populous county but is smaller in population than a congressional district. It is divided by the District into three concentrations of voters - one in the east which is predominantly white, one in the center which is predominantly black, and one in the west which is predominantly white. Mecklenburg Precinct 77 is then split to connect the two white urban areas into Congressional District 9. District 9 also contains some adjacent whole counties with predominantly white rural, suburban and urban sections. The black urban area of Mecklenburg County is linked by white "corridor" precincts to the black urban areas of Greensboro, Winston-Salem, and High Point.

at Statesville and goes over to Salisbury where it follows generally the I-85 corridor until part of the district branches off to Winston-Salem. *See* Ex. 66. Black voters in Winston-Salem are not connected by I-85, and many white voters not in the Twelfth District have as least as much link to I-85 as many blacks in the Twelfth District. Therefore, I-85 provides no basis to distinguish black voters included in District 12 from nearby white voters who are excluded. *Cf. Bush v. Vera*, 517 U.S. 952, 966 (1996) (O'Connor, J., plurality opinion) (finding no basis for displacing finding of predominance when purported race-neutral explanations do not differentiate the district from surrounding areas with the same degree of correlation as does racial data).

Thus, unless community of interest is defined in racial terms the Twelfth District lacks "community," and even then the connecting white corridors would fall outside the "community." Defining community of interest on the basis of race would violate *Shaw* because it justifies a plan that "includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries" on the very grounds that *Shaw* condemns. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

2. The racial explanation for the Twelfth District is better supported than the alternative political explanation advanced by Appellants.

a. The Twelfth District is too safe to be understood as an attempt to protect a generic Democrat rather than as an attempt to ensure that a black Democrat wins the primary and then the general election.

Appellants criticize the district court for giving weight to Dr. Weber's statement that the Twelfth District of the 1997 Plan is "too safe" to be explained merely as part of an effort to

maintain a 6-6 partisan balance. Appellants' Brief at 27. Appellants misapprehend the thrust of his analysis. Dr. Weber's point is not merely that he prefers competitive districts, but that an explanation that the district was constructed for a Democrat of any race to win is probably inaccurate if the district is "safer" than necessary for any Democrat to win. Contrary to the State's view, Appellants' Brief at 11, 30, the record contains a number of "viable alternatives" to the 1997 Plan. These Twelfth Districts "safe" for any Democrat include the 1998 plan and draft plans dated as far back as 1995. *See, e.g.*, Ex. 126-129.

Dr. Weber's analysis regarding competitiveness reveals the true purpose of the legislature. The Twelfth District is gerrymandered so that African-Americans make up about 60% of the persons eligible to vote in a Democratic primary. As Dr. Weber noted, in this district "black voters have the ability to control the Democratic nomination" and can then "count on some crossover voting in the general election to win." Jt. App. 754. *Accord*, Cohen Dep. at 199-200. Or, as plaintiff Jake Froelich put it, for "a white candidate in a primary", it "would be very, very difficult for that person to be nominated." Jt. App. at 67. *See also* Ex. 52, pp. E-1, E-2, E-4, and E-8 (analysis of reconstituted Democratic primary election results).

North Carolina has party primaries which are only open to registered voters of the party and to independents, and in which a candidate with a plurality can win a primary with just 40% of the vote. N.C. Gen. Stat. § 163 - 111 (1999). Thus the relative numbers of the black and white registered voters in a district can have a major influence on who is most likely to win the primary. If the number of registered white Democrats in a district is less than a majority, but more than 40%, a risk remains that a single candidate with united white support might prevail over a fractured field of other candidates whose support

comes overwhelmingly from black voters.[23] In the context of the Democratic primary, racial registration data is especially important in discerning predominant racial motive.

Because of the addition of the "Greensboro Black community" in the Cooper 3.0 plan, the percentage of Democrats who were black increased from 52.5% to 60.2%.[24] Appellants' J.S. App. 241; Ex. 130D. Later, a number of minor changes were made to the Twelfth District in its final form, and this percentage was increased to 60.5%. Appellants' J.S. App.

---

[23]In the 1992 Democratic primary this almost came to pass in the First District. State Representative Walter Jones, Jr., son of the retiring First District Congressman Walter Jones, Sr., competed as a Democrat and received 38% of the vote, while another white and several black candidates divided the remaining vote. With 40% of the vote Jones would have become the party nominee and in that event undoubtedly would have been elected. However, in the runoff, Eva Clayton, who was preferred by black voters, received a majority and the nomination, and then she won easily in the general election.

[24]The calculation of the black portion of Democratic primary voters is made possible by the fact that North Carolina maintains its voter registration records both by party and by race. Appellants' J.S. App. at 79a; Ex. 206. The numerator is the number of black registered voters in the 12th District times the rate of black registration as Democrats. Mr. Cohen previously studied that rate, and determined the figure to be 95% in urban areas. Jt. App. at 589. The denominator is the group of voters permitted under North Carolina law to vote in Democratic primaries, which is Democrats plus registered independents (only 773 in this district), who may choose to vote in one of either party's primary. Stip. 53, Jt. App. at 17.

For example, using the numbers from Appellants' J. S. App. 79a, the 1997 Twelfth District Democratic primary black percentage of 60.5% is calculated by multiplying the number of registered black voters in the District, 126,488, by 0.95, the rate of black registration as Democrats. The product, 120,164, is divided by the sum of the number of registered Democrats and the number of registered independents (197,783 + 773 = 198,556). The resulting quotient is 60.5%.

79a. On the other hand, under the 1998 Plan, Jt. App. at 502, - which was used in the 1998 primaries and elections - the percentage of Democrats who were black was 47.9%. Ex. 103B. These percentages - when considered in conjunction with the 40% rule - help explain the predominant racial purpose of the General Assembly (a) in shaping the 1997 plan's Twelfth District, and (b) later in inserting the provision whereunder the State would revert from the less racially gerrymandered 1998 plan to the 1997 plan if the State successfully appealed the summary judgment against that plan.

The same consideration may explain the reluctance to include some white Democratic precincts adjacent to the district, and the failure to exclude some white Republican areas in return. Adding white Democratic precincts would weaken the control of the primary by the otherwise dominant racial group in the district. On the other hand, retaining the white Republican precincts would not change the results of the general election in November; and so the white Republican voters can be used as mere "filler." John Hart Ely, *Standing to Challenge Pro-Minority Gerrymandering*, 111 HARV. L. REV. 576, 584 (1997).

The overwhelming partisan safety of the 1997 district is illustrated by the results of statewide elections calculated for the precincts in the 1997 version of the District. Jt. App. 90-91; Ex. 52, pp. E-3, E-5, E-6, E-7, and E-9; Jt. App. 92-93; Ex. 206 (NCEC data used by Sen. Cooper showing an average Democratic performance of 62.7%, and President Clinton in 1996 polling 64.4% within the 1997 District 12). The overwhelming safety is confirmed by the 1998 general election results, when the District had been reduced to a 33% black voter registration (Ex. 103B), but provided Congressman Watt 56% of the vote. *See* Stip. 74, Jt. App. at 20. In other words, the General Assembly did much more than just avoid pairing incumbents. *Cf.* U.S. Brief at 14. It considered the political

interests of each incumbent as an individual and then gerrymandered the Twelfth District predominantly with the purpose to assure a racially determined result in the primary. As a result, contrary to the suggestion by the Solicitor General, U.S. Brief at 17, this district is fundamentally different from the district in *Lawyer v. Department of Justice*, 521 U.S. 567 (1997). It does not offer any candidate without regard to race the opportunity to seek office and be elected. *Cf. id.* at 581. Rather, it is specifically designed to ensure that only a candidate of one preordained race will be elected.

b. The Twelfth District of the 1997 Plan essentially maximized its African-American population, but not its Democratic voters.

As the district court noted, Appellants' J.S. App. at 7a, Dr. Weber looked at maps and data and found divisions along racial lines. *See also* Jt. App. at 97. Although Appellants seek to fracture the evidence in order to discount it, Dr. Weber's finding of a greater correlation is fully supported by the evidence when taken as a whole.

In an effort to avoid the *Miller* test, the Solicitor General suggests that in order to prevail the *Shaw* plaintiffs must show how to construct a more politically gerrymandered district. However, in no other *Shaw* case has any court suggested that plaintiffs must illustrate how a more Democratic or incumbent-friendly district may be formed in order to prove racial gerrymandering. Moreover, such a requirement - which the plaintiffs in *Shaw* itself might not have been able to fulfill - ignores the role of race in determining who will be the party nominee and disregards many other factors which should be considered by the fact-finder in light of all the evidence.

The maps appended show precincts outside the district which voted for the Democratic candidate in all three elections (confirming Dr. Weber's testimony that precincts with

Democratic *voting* behavior also adjoin District 12, Jt. App. 103-05) and some precincts inside the district which vote Republican in the same group of elections. Thus, they make clear that a swap could occur. App. at 2a-4a. The Democratic voting performance of the district would be boosted by removing all precincts which voted Republican in all three elections, and substituting precincts with similar population which voted Democratic in all three elections.[25] Extending the district to Burlington or Gastonia in a manner not unlike the 1992 Twelfth District would also have a similar effect of increasing the Democrat performance of the district. Finally, the Democratic strength as measured by the 1988 Court of Appeals race would increase from 61.5% to 68.3% by re-adopting the 1992 plan as a "max-Democrat plan." *Cf.* Ex 101B; Appellants' J.S. App. at 80a.

Thus, Judge Thornburg errs, Appellants' J.S. App. at 50a, as do Appellants, Appellants' Brief at 28 - 29, and App. 1a -3a, and the Solicitor General, U.S. Brief at 7, 20 n.6, and 24-25 n.10, in suggesting that the *only* way to include Democratic performing, mostly white precincts in Guilford or Forsyth or

---

[25]For example, by exchanging Greensboro 11 and 14 with High Point 1, 13, 15, and 19, the loyal white Democrats in central Greensboro's university community could be traded for an equivalent number of white, suburban, Republican voters in High Point. Similar trades of equivalent white populations with different politics could replace Thomasville 1 and Lexington 3 with Greensboro 17 and Charlotte 81 and LC1-South in Mecklenburg with Charlotte 10 and 21. By reworking other districts, and by using a computer instead of identifying these precincts by hand from population data from Table 5, Jt. App. at 339-356, maps of Republican victories, App. at 2a-4a, precinct maps at Jt. App. at 487, 488 and Ex. 145, and the raw data from the state computer system (using Exs. 21, 22, and 132), this list could no doubt be expanded. Each substitution affects compactness and appearance, but the legislature has already ignored both to such a degree that any further distortion appears immaterial.

Mecklenburg counties in the district is to displace the immediately adjacent precinct, which may be more black and more Democratic in performance. This is a false choice. These reliable, but white Democrats could be substituted for any one of the other 154 precincts in the entire district with lower Democratic voting performance, equivalent population, and a geographic location permitting the exchange.

c. The "segment analysis" advanced by Dr. Peterson was properly found by the District Court to be unreliable.

The finder of fact in this case recognized that Dr. Weber had "presented a convincing critique of the methodology" used by Dr. Peterson and showed it to be "unreliable." Appellants' J.S. App. at 27a. *See also* Jt. App. 112-23. Contrary to Appellants' contention that "Weber and the district court majority, however, inexplicably dismissed Peterson's segment analysis," (Appellants' Brief at 29 n.36), the district court had ample basis for finding that his analysis was "non-traditional," "ha[d] 'not been appropriately done,' and was therefore 'unreliable.'" Appellants' J.S. App. at 27a (quoting Dr. Weber at Jt. App. at 119).

Dr. Peterson's rejected analysis - the so-called "segment analysis" - was unprecedented in any voting rights or *Shaw* cases. Not only had this analysis not been applied to any other district, but it had also not been presented at any academic institution or published in any scholarly journal for peer review. Jt. App. at 257.

Contrary to the State Appellants' implication that the only major concern of the court with Dr. Peterson's "segment analysis" was that it ignored the core of the Twelfth District, it contains many fundamental defects which render it unreliable and irrelevant to the question it purports to address. *See, e.g.,*

Pet. Dep. at 14-20, 33, 41-44, 48-51, 56, 62, 64-72, 78, 87-88.[26] The chief defect is that Dr. Peterson's analysis is not a decisional analysis. Jt. App. at 732. In other words, it does not try to take into account the "real world" macro level decisions of whether or not to split another county, choose a different core for a district or add "the Greensboro Black community." Jt. App. at 112-13, 716, 732. *Cf. Bush v. Vera*, 517 U.S. 952, 972 n.1 (1996) (O'Connor, J., plurality opinion) (criticizing dissent for ignoring "the necessity of determining whether race predominated in the redistricters' actions *in light of what they had to work with"*) (emphasis in original). Moreover, Dr. Peterson relied on obviously faulty data. *See, e.g.*, Jt. App. at 721-726. Also, Dr. Peterson did not measure people, but instead analyzed arbitrarily chosen segments along the boundaries of the Twelfth District without weighing the size or relative degrees of differences in the segments.[27] This failure to give weight to the segments renders Dr. Peterson's analysis a meaningless mathematical exercise with no relevance to the demographic realities on the border of the Twelfth District.

---

[26]The analysis was so unreliable and therefore irrelevant to the task at hand that Appellees even moved to exclude Dr. Peterson's opinion pusuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). That motion, although not granted, outlines in detail reasons for giving no weight to Peterson's analysis.

[27]For example, with respect to one boundary segment, between High Point Precincts 1 and 4, Dr. Peterson observed that seven African-Americans out of a total registered voter population of 2,114 in the outside precinct was a higher proportion than four out of 1,212 on the inside. Jt. App. at 729-731. This trivial difference, less than .01%, was used as evidence that the legislature did not always prefer and include the more heavily black precinct inside the district, thus counting against the "racial hypothesis." In some manner, weight should have been given to the number of persons - black, white, Democrat, or Republican - on each side of the boundary

Even if the factfinder had accepted at face value Dr. Peterson's testimony, the ultimate conclusion of Dr. Peterson was that he was unable to determine whether race or party predominated over the other.[28] Accordingly, his testimony had little evidentiary value.

C. Direct evidence also supports the District Court's finding that race predominated.

Appellants claim that the North Carolina General Assembly was merely "conscious" of race. Appellants' Brief at 12. The direct evidence in this case reveals a different story. The General Assembly had racial goals which had to be met and which could not be compromised. *Cf. Shaw v. Hunt*, 517 U.S. 899, 907 (1996).

1. E-mail establishes that the State used a racial approach to redistricting, and that a significant number of voters were placed into the district based on race.

The discovery process revealed an E-mail from Gerry Cohen, the draftsman of the 1992 and 1997 plans, to Senator Cooper and Senator Leslie Winner.[29] This E-mail

---

[28]In contrast to the report of his views at the summary judgment stage, Dr. Peterson at trial retreated from his conclusion that politics better explains the boundary of the district, and instead stated that race and politics were "statistically indistinguishable." Jt. App. at 248. He certainly no longer concludes that Democratic performing precincts are included "much more often" than black ones. *Hunt v. Cromartie*, 526 U.S. 541, 550 (1999).

[29]Cohen was the draftsman of the 1992 Plan and Senator Winner had been a private voting rights attorney practicing in Charlotte in the same law firm as Rep. Mel Watt. She was hired as a consultant by the North Carolina House of Representatives for the 1992 Plan, and had a very large role in the drawing of that plan. Later elected as a state senator, Leslie Winner played a very significant role in the 1997

memorialized the decision to add the "Greensboro Black community" to the Twelfth District and the corresponding need to remove approximately 60,000 persons, who turned out to be mostly white. Jt. App at 369. The E-mail was sent February 10, 1997, and reflects the change which gave the 1997 Plan Twelfth District its ultimate form.

As the district court correctly found, this E-mail "clearly demonstrates that the chief architects of the 1997 Plan had evolved a methodology for segregating voters by race, and that they had applied this method to the 12th District." Appellants' J.S. App. at 27a. Also, as the District Court observed, "[t]he computer system used by the state has the capacity to identify and apportion voters based on race, and to determine the exact racial make-up of each district. The Cohen-Cooper e-mail reveals that exact percentages were used when constructing districts." *Id.* at 28a.

Appellants deride the significance of this "hastily drafted E-mail." Appellants' Brief at 39. They claim that the phrase "Greensboro Black community" "was merely a shorthand description for those sections of Greensboro that were added to the district - areas that were predominantly African-American *and* solidly Democratic." *Id.* Therefore, they protest that "an equal protection violation cannot turn on Cohen's failure to stick the word 'Democratic' between 'Greensboro' and 'Black.'" *Id.*

However, it is in part the very haste and informal nature of this E-mail that give it its relevance. This E-mail was not meant for public and judicial consumption and was not filtered through a carefully drawn formal affidavit. Instead, it provides a view behind the scenes into what those who drew up the redistricting plans were really thinking and talking about. As

---

Redistricting Plan, working closely with Senator Cooper and even personally working the redistricting computer. Winner Dep. at 50.

that E-mail reveals, behind the scenes the principal authors of the plan had a single-minded obsession with the racial composition of the First and Twelfth Districts, rather than the political. The fact that the entire E-mail is primarily a discussion of race and racial percentages for the First as well as the Twelfth District belies the State's attempt to explain away the reference to the "Greensboro Black community" as a shorthand reference to the "Greensboro Democratic community." *Cf. Shaw v. Hunt,* 517 U.S. 899, 907 ("Race was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made."). This E-mail is a snapshot view of a *Miller* violation in process, as Gerry Cohen, the plan's draftsman, memorialized a precise moment in which he "place[d] a significant number of voters within or without a particular district" on the basis of their race. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). As a result of this decision, the Twelfth District added a net of 40,000 African-American persons and increased from 40% to 47% black. *See* Appellants' J.S. App. at 241a; Ex. 130D. *Cf.* Appellants' Brief at 39-40, n.48. Also, the black percentage of the total Democratic primary voters was boosted to 60%.

2. The District Court correctly found that the General Assembly achieved its racial target for the Twelfth District of just under 50%.

Looking at the direct evidence in this case, the District Court found that "the clear inference here is that a motive existed to compose a new 12th District with just under a majority minority in order for it not to present a prima facie racial gerrymander." Appellants' J.S. App. at 28a. This crucial finding confirms an explicit racial target for the district, and a purpose to avoid judicial review of racial gerrymandering by

staying below a supposed threshold for such review. This finding is the predicate for the district court's subsequent ruling that "using a computer to achieve a district that is just under 50% minority is no less a predominant use of race than using it to achieve a district that is just over 50% minority." *Id.*[30]

Neither Appellants nor any of their allies mentioned this

[30]Contrary to the opposing position expressed by Senator Cooper at the time the 1997 Plan was passed, achieving a racial target of just under 50% by substantially disregarding traditional redistricting principles is violative of "the essence of the equal protection claim recognized in Shaw [which] is that the State has used race as a basis for separating voters into districts." *Miller*, 515 U.S. at 911. Clearly, splitting numerous cities along racial lines in order to achieve a racial target of just under 50% is placing "a significant number of voters within or without a particular district" on the basis of race. *Id.* at 916. And, when any racial percentage is targeted, it is fair to say that "the decisionmaker . . . selected or reaffirmed a particular course of action (as to that district) at least in part 'because of,' not merely 'in spite of,' its adverse effects." *Id.* (citations omitted).

In *Lawyer v. Department of Justice*, decided after enactment of this 1997 plan, the Court addressed a district of 36.2% black voting age population which was found to have been open to election of a candidate of any race. 521 U.S. 567, 581 (1997). In *Lawyer*, this finding was approvingly cited as supporting the District Court's ultimate finding that race did not predominate in that district - a finding which the Court found was not clearly erroneous. *See id.* at 582. On the other hand, the 1997 Twelfth District is excessively safe for an African-American candidate of choice, including the present incumbent. More important, however, the Court has never held that the Equal Protection Clause does not apply to districts with less than 50% minority population. Accordingly, federal courts have applied the *Shaw/Miller* doctrines to invalidate several majority white districts in other instances. *Kelley v. Bennett*, 96 F.Supp.2d 1301, 1302 (M.D. Ala. 2000) (three-judge court), *appeal docketed*, No. 00-132 (U.S. July 24, 2000); *Smith v. Beasley*, 946 F.Supp. 1174, 1176 (D.S.C. 1996) (three-judge court); *Johnson v. Miller*, 929 F.Supp. 1529, 1550 (S.D.Ga. 1996) (three-judge court) (House District 120).

critical finding in their "rigorous review of the record and decision below." Appellants' Brief at 16. Appellants do obliquely refer to "the court's reliance on a second statement by Cooper during the Senate floor debate that strict scrutiny analysis may not be triggered because District 12 is not majority-minority." Appellants' Brief at 39.[31] However, contrary to Appellants' assertion, Senator Cooper was not "merely reciting his understanding of the current state of equal protection law." *Id.* Moreover, the legislative record itself belies Senator Cooper's claim that he had not even thought of this argument "until this final plan had been prepared." Jt. App. at 228.

The final plan referred to by Senator Cooper, was prepared and agreed to on March 24, 1997. Jt. App. at 507. However, on February 20, 1997, when Senator Cooper presented his first plan publicly to his Senate Committee -

[31]Senator Cooper said:

> I believe that this new 12th District is constitutional for several reasons. First, and maybe most importantly, when the Court struck down the 12th District it was because the 12th District was majority-minority and it said that you cannot use race as the predominant factor in drawing the districts. Well guess what! The 12th District, under this plan, is not majority-minority. Therefore, it is my opinion and the opinion of many lawyers that the test outlined in *Shaw v. Hunt* will not even be triggered because it is not a majority-minority district and you won't even look at the shape of the district in considering whether or not it is constitutional. That makes an eminent amount of sense because what is the cutoff point for when you have the trigger of when a district looks ugly? I think that the court will not even use the shape test, if you will, on the 12th District because it is not majority minority. It is strong minority influence, and I believe that a minority would have an excellent chance of being elected under the 12th District.

Jt. App. at 475-476.

more than a month before the final plan was developed - Senator Cooper advised his committee that one of the reasons this earlier plan was constitutional was that its Twelfth District was not a majority-minority district. *Id.* at 395-396.

A month later, on March 19, 1997, Senator Cooper once again defended his first public plan, Senate Plan A, at the next official meeting of his Senate committee. There also, after mentioning that its Twelfth District was not majority-minority, Senator Cooper said "I don't believe, certainly we can argue and don't believe that the test for the constitutionality as laid out in *Shaw v. Hunt* would even be considered because it is not majority/minority." Jt. App. at 406. Additionally, during that meeting Senator Cooper criticized a rival plan offered by Senator Betsy Cochrane for "triggering the test" of *Shaw*.[32]

Likewise, Rep. McMahan informed the members of the House of Representatives on the floor that one of the reasons the 1997 District 12 would be constitutional was because it was "[n]ot a Majority/Minority District now so shape does not create that - that was the basis the Court used to say this was unconstitutional - not an argument now." Jt. App. at 465. Even more tellingly, when Rep. McMahan informed his committee that he had decided to acquiesce to the Senate version of District 1 and 12, he said, "The Plan you see does maintain racial fairness in District 1 and 12. *We've actually agreed to increase the percent of minorities in District 12 to 46% and are now basically following the Senate Plan on District 1 and 12."*

---

[32]In regards to her 12th District, he said, "I believe it's a little over 41% African-American and a little over 8% Native-American, so you add those together, you make it majority/minority. That in turn would trigger the test under *Shaw v. Hunt* and I don't think our 12th District . . . under Plan A has triggered the test." Jt. App. at 415. Similarly, he criticized another district. "In the 1st District, I think you have some of the same problems. You do trigger the test because it is majority/minority . . . ." *Id.* at 416.

Jt. App. at 455 (emphasis added).

Similarly, when asked about the racial fairness of his plan on the floor of the House, Rep. McMahan responded by saying that "we have done our best - our dead level best - to draw two Districts that are fair racially and *do have one of them the majority of the population and the other one over 46%, and that's the very best we could do on both sides, and we looked at this very, very closely."* Jt. App. at 471 (emphasis added).

These statements made by Senator Cooper and Representative McMahan about avoiding the test of *Shaw* demonstrate their clear racial motive - a motive to be free of any *Shaw* restrictions on their racial gerrymandering. If there were no racial motive driving the formation of the Twelfth District, there would be no need to be concerned about "triggering the test of *Shaw*." Finally, even if the court had credited Senator Cooper's statement,[33] the ultimate question is still the legislative intent, and not the subjective intent of Senator Cooper. The fact that this rationale was advocated to the General Assembly by the chairmen of the redistricting committees in both Houses in and of itself is enough to support

---

[33]Legislative witnesses' "inconsistent statements must be viewed in light of their adversarial context. But such questions of credibility are matters for the District Court." *Bush v. Vera*, 517 U.S. 952, 970 (1996) (O'Connor, J., plurality opinion). The fact finder's determination of the lack of credibility of Appellant's witnesses was both impeaching evidence and substantive evidence against Appellant's position. *See, e.g. Reeves v. Sanderson Plumbing Products,* Inc., ___ U.S. ___ , 120 S.Ct. 2097, 2108 (2000). *See also McQueeney v. Wilmington Trust Co.*, 770 F.2d 916, (3rd Cir. 1985). Contrary to the Solicitor General's assertion, U.S. Brief at 27, the district court's finding of Senator Cooper's lack of credibility was not based on its reading of statistical evidence, but on its evaluation of Senator Cooper, his demeanor, consistency, and the plausibility of his testimony.

the district court's finding of a specific racial target.[34]

3. The General Assembly deliberately and successfully preserved the racial balance of two African-American congressmen and ten white congressmen.

Not only did the district court find the existence of a targeted racial percentage, it also found that the General Assembly had a goal of preserving the racial balance of North Carolina's congressional delegation. *See* Appellants' J.S. App. at 27a. This finding goes to the ultimate and overriding racial goal of the General Assembly for the Twelfth District: preserving the racial quota or balance of two African-American congressmen and ten white congressmen. The target of just under 50% African-American for the 12th District could be fairly characterized as the means to this end.

This is the essence of the frequent allusions of members of the General Assembly to the crucial necessity for "racial fairness." *See* Jt. App. at 393, 443, 444, 447, 453, 455, 459. 464, 470, 471, 475. In the legislative record, the discussion about the Twelfth and First Districts was not so much their contributions to "partisan balance," but rather to racial fairness. *See id.* Moreover, while the actual partisan balance shifted frequently in the 1990s, the racial balance was kept constant.[35]

---

[34]Senator Cooper admitted that there was a racial target of creating the First District to be a majority-minority district and this could not be compromised. Jt. App. at 224. This admission makes more plausible the court's finding of a racial target in the Twelfth, because these two districts were linked in the legislative discussions about racial fairness and balance. *See id.* at 391-481.

[35]Appellants have raised the attempt to preserve a partisan balance as a defense for the 1992, 1997 and 1998 plans. Actually, the "partisan balance" of the Congressional delegation shifted in each of the 1992, 1994, 1996, and 1998 elections, going from 8-4, 4-8, 6-6, and 5-7 Democrats versus Republicans. The racial balance, however, has remained constant at two blacks and ten whites, as it was intended to do under the 1992, 1997, and 1998 plans.

Appellants argue that the presence of the term geographical balance in the same phrase as political and racial balance means that "there was no reason to assume . . . that Senator Cooper's reference to race had a numerical connotation." Appellants' Brief at 39. This argument does not logically follow. The very term "balance" itself implies a quantifiable distribution. Moreover, geographic balance in the context of the 1997 plan could have several plausible meanings. It could refer to the stated goal of not dividing any county into more than two districts. It could also refer to the basic distribution of the Congressional districts across the three geographic divisions of North Carolina - the coastal plain, the Piedmont, and the mountains.

4. The General Assembly preserved the racial cores of the prior unconstitutional district.

Likewise, the General Assembly's attempt to retain and re-label the racial core of a prior unconstitutional district is itself evidence of racial intent.[36] *See* Jt. App. at 486. In the

---

[36] According to Senator Cooper, "[w]hat we tried to do was to make each district more geographically compact, leaving the core area for each of the present districts. That means that each of the incumbents are there in their core area and the districts have not changed radically to the point of affecting the past political outcome." Jt. App. at 398.

The deposition testimony of Senator Leslie Winner, who played a key role formulating the 1992 Plan and in assisting Senator Cooper in the 1997 Plan, illustrates the racial character of the term "core." "[F]or any incumbent you would have a constituent base that you considered to be your core constituent base and that - that you would like to keep if the district was modified." Jt. App. at 779. "For example, Eva Clayton may have thought that the black communities of Fayetteville and Wilmington were part of her core constituent base and she didn't keep them. Mel Watt may have thought that the black community of Durham was one of his core constituent bases and he didn't keep that." *Id.*

1997 Twelfth District, 90.2% of the African-Americans had also been residents of the 1992 Twelfth District, while only 48.8% of the white population in the 1997 Twelfth District had also been in the 1992 Twelfth District. Jt. App. at 78. Thus, it seems clear that in this context, "maintaining the core" was maintaining the racial core. *See* Jt. App. 128-29.

In *Abrams v. Johnson,* the Court stated that when several districts in a redistricting plan were predominantly race based and therefore unconstitutional, they were "improper departure points" for the drawing up of a new remedial plan. 521 U.S. 74, 90 (1997). Instead, the courts are called on to "correct - not follow - constitutional defects in districting plans." *Id.* at 85. "Using (an unconstitutional) precleared plan as the basis for a remedy would validate the very maneuvers that were a major cause of the unconstitutional districting." *Id.* (upholding the District Court's decision to use the 1972 and 1982 plans as a basis for the remedial redrawing of Georgia's Congressional districts following *Miller v. Johnson,* 515 U.S. 900 (1995)).

For the Court to approve use of the racial core of a district that has been held to be unconstitutionally race-based in order to preserve the "racial balance" or racial quota of the prior plan would likewise "validate the very maneuvers that were a major cause of the unconstitutional districting." *Abrams,* 521 U.S. at 86. This is especially true in this case, where the "core" of District 12 is the racial archipelago of African-American areas in all the major Piedmont cities strung together by white corridors. By attempting to preserve the core of the unconstitutional district in this way, Appellants have not cured the constitutional defects of the prior plan. Instead they have merely adopted a plan with a "physically modified but conceptually indistinguishable 'new' [district], again violating historical political subdivisions and ignoring other traditional redistricting criteria." *Hays v. Louisiana*, 936 F.Supp. 360, 372

(W.D. La. 1996) (three-judge court), *appeals dismissed as moot, Louisiana v. Hays,* 518 U.S. 1014 (1996). *Cf.* Jt. App. at 469 (African-American legislator observing that "all you have done with the Twelfth District in this bill is knock sixty miles off of it").

Appellants now rely on the protection of incumbents as their chief defense for this plan. *See* Appellants Brief at 21. But when the plan was under consideration, Senator Cooper emphasized to his colleagues that "this is not an incumbent protection plan." Jt. App. at 477. "I don't want this to be called an incumbent protection plan because it is not." Jt. App. at 398. Moreover, the racial character of this district was deliberately designed to transcend its incumbent. According to Rep. McMahan speaking on the House floor, this particular district "[a]bsolutely without any question" was designed so that not only Mel Watt but also "anyone else that might choose as a minority to run in that District should feel very, very comfortable . . . that they could win." Jt. App. at 470.

If incumbency protection can be a defense to racial gerrymandering even when the incumbent won election in a district adjudicated to be unconstitutionally race-based, Appellants would have been able to reenact the 1992 Twelfth District under the guise of "incumbency protection" or "retaining the partisan balance." To allow this would make a mockery of *Shaw v. Reno* and its observation that "appearances do matter." 509 U.S. 630, 647 (1993). The Court should not permit constitutional violations to be perpetuated in the name of incumbency protection.

Because of the method and motive involved in the protection of the incumbent of the Twelfth and surrounding districts in the 1997 Plan, the use of incumbency protection in this case is no longer race-neutral, and thus is not entitled to

deference.[37] Incumbency protection cannot be used to circumvent the Fourteenth Amendment, as was noted in *Vera v. Richards*. "Incumbency protection is a valid state interest only to the extent that it is not a pretext for unconstitutional racial gerrymandering." *Vera v. Richards*, 861 F.Supp. 1304, 1336 (S.D. Tx. 1994) (three-judge court) (criticizing the

[37]In Appellants' own Section 5 Submission, the racial nature of Appellants' incumbency protection efforts is made clear in the discussion of the House's rejection of three alternative redistricting plans proposed by two African-American legislators. It noted that "all three plans would seriously weaken the ability of the African-American incumbent in District 12 (Congressman Watt) to win re-election." Ex. 100, 97C-27R. Specifically, "[t]he African-American percentage in District 12 is only 37.66 percent in Plans B and C and 37.44 percent in Plan A - approximately nine percent lower than the African-American percentage of District 12 in the enacted plan." *Id.*

The assumption of Appellants and their allies that any redistricting action is cleansed of its racial nature simply because it is adopted to protect an incumbent is not supported by the Court's precedents. Appellants especially overreach by implying that Appellees bear the burden of disproving the presence of incumbency protection in the drawing of this plan in order to establish racial predominance. Appellants' Brief at 9, 21. Appellants overlook the fact that racial predominance and incumbency protection are not mutually exclusive. *See Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (stating that the circumstance that the legislature protected incumbents "does not in any way refute the fact that race was the legislature's predominant consideration"); *Bush v. Vera*. 517 U.S. 952, 965 (1996) (O'Connor, J., plurality) (finding it "clear that race was not the only factor that motivated the legislature to draw irregular district lines" in view of incumbency protection evidence); *Vera v. Richards*, 851 F.Supp. 1304, 1339 (S.D. Tex. 1994) (three-judge court) (finding that incumbent protection was "not a countervailing force against racial gerrymandering," but rather that "racial gerrymandering was an essential part of incumbency protection"), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).

"talismanic status of incumbent protection in the State's argument"), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).[38] Accordingly, the district court noted that the General Assembly was free to consider incumbency protection "to the extent consistent with curing constitutional defects." Appellants' J.S. App. at 29a-30a. Appellees submit that in the context of attempting to satisfy a racial quota through racial means, the General Assembly's goal of protecting the incumbent of the unconstitutionally race based 1992 Twelfth District in order to preserve the "racial balance" of the 1997 Plan is an admission of racial motive, not a defense against it. At the least, it is additional evidence of the General Assembly's racial intent.

5. North Carolina legislators who had no motive to conceal the use of race testified that race predominated in the formation of the 1997 Plan's Twelfth District.

In their "rigorous review of the record and decision below," Appellants' Brief at 16, Appellants and their allies also do not mention that the district court had the benefit of the direct testimony of several witnesses who were members of the

[38]Likewise, in the Voting Rights Act context, incumbency protection can not be used as a bar to providing a full remedy for a Section 2 violation. *Jeffers v. Clinton*, 756 F.Supp. 1195, 1203 (D. Ark. 1990) (three-judge court), *aff'd* 498 U. S. 1019 (1991); *Terrazas v. Clements*, 581 F.Supp. 1329, 1356 (W.D.Tex. 1984) (three-judge court). Also, where "racial or ethnic communities were split to assure a safe seat for an incumbent, there is a strong inference - indeed a presumption - that this was the result of intentional discrimination." *Garza v. County of Los Angeles*, 918 F.2d 763, 779 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part). *See also Rybicki v. State Bd. Of Elections*, 574 F.Supp. 1082, 1109 (N.D. Ill. 1982) (three-judge court) ("to maintain a safe, primarily white district" for incumbent indicates a purpose to practice racial discrimination); *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984).

General Assembly and who testified that race predominated in the formation of the Twelfth District of the 1997 Plan. *See id.* These legislators had no motive to conceal the use of race in the Twelfth and First District obvious to any objective observer of the North Carolina political scene.[39] As Senator Blust stated in the Senate Chamber, "there were just two factors that went into developing this plan - one was protecting incumbents, the other was race." Jt. App. at 478.

Appellants assert that North Carolina's 1997 redistricting plan does not "convey the message that 'political identity is, or should be, predominantly racial.'" Appellants' Brief at 13, citing *Bush v. Vera*, 517 U.S. 952, 980 (1996) (O'Connor, J., plurality opinion). However, the racial message emanating from District 12, even later in its more compact 1998 version, was clearly received by that District's own representative and his campaign committee and staff as they communicated with and campaigned to voters whom they defined on the basis of race. Those whose livelihoods depended on getting their candidate elected targeted African-American voters through direct mail, African-American newspapers, and radio stations chosen because of their predominantly African-American audience. *See* Jt. App. at 578-583. *See also Shaw v. Hunt*, 861 F. Supp. 408, 478 n.5 (E.D.N.C. 1994) (Voorhees, J. dissenting), *rev'd, Shaw v. Hunt*,

---

[39]Senator Hamilton Horton, who represented Forsyth County, testified that the Twelfth District was created predominately with a racial motive. Appellants' J.S. App. at 5a. He further testified that the Twelfth District's boundaries reflected its racial predominance in Forsyth County by splitting Winston-Salem along racial lines. Jt. App. at 25-32. Representative Steve Wood, who was the Speaker *pro tem.* of the House, testified that "the 1997 Plan divided High Point and Guilford County along racial lines for a predominantly racial motive." Appellants' J.S. App. at 6a. Finally, Representative John Weatherly also testified that the Twelfth District was drawn for predominantly racial reasons.

517 U.S. 899 (1996).

Thus, someone who pays attention to politics in North Carolina still receives the same racial message today from the 1997 District as he or she did from the 1992 District. As plaintiff Jake Froelich put it, "[i]t is still doing the same - much the same thing . . . trying to interconnect areas that are not interconnected any other way, trying to do it solely to accomplish a racial purpose." Jt. App. at 680. Or in the words of Rep. Michaux, an African-American legislator quoted previously in *Shaw v. Reno,* 509 U.S. 630, 636 (1993), "[a]ll you have done with the 12th District in this bill is knock sixty miles off it." Jt. App. at 469.

D. The context of this case is relevant to the issues of predominantly race based motive and credibility.

The district court specifically declined to consider the similarity of the 1992 and 1997 plans in evaluating the legality of the latter plan. However, in this instance where the plan is purported to remedy a prior unconstitutional racial gerrymander, the Court may consider the 1992 plan. In that event, the strength of Appellees' showing of racial predominance is enhanced.

1. The shape of the 1997 Twelfth District stems from the unconstitutional maximization policy of the Department of Justice.

Although the Department of Justice did not deny preclearance for the 1997 plan, its refusal to preclear an earlier plan in 1991, Ex. 222, set in motion the chain of events leading to the present 1997 racial gerrymander of the Twelfth District. Moreover, its heavy hand was still very much on the minds of the legislators as they drew up the 1997 Plan. *See* Jt. App. at 392, 405, 407, 407-408, 443, 464, 470-471, 475. *Cf.*, ACLU Brief at 7 n.7. The Department of Justice's illegal

maximization policy helps explain why the General Assembly enacted a 1992 and 1997 plan which linked Mecklenburg County to Forsyth County and Guilford County, which had not been done for almost 200 years. To claim now that a district following this pattern and maximizing the African-American population in these cities was not primarily drawn for racial purposes strains credulity.

2. The credibility of Appellants' defense suffers further from its prior application to the unconstitutional 1992 Twelfth District, for Appellants have recycled almost every argument in defense of that district point by point.

In defending the 1997 Twelfth District, Appellants have recycled virtually every argument used in defense of its unconstitutional predecessor, the 1992 Twelfth District.

First, Appellants have severely criticized the district court in this case for failing to accord proper deference to the General Assembly, ignoring the presumption of good faith it is entitled to, and substituting its political judgment for the legislature. Similarly, in 1995 Appellants criticized the *Shaw* District Court's finding of a racial motivation because it "inappropriately restricted the broad 'discretion' and 'presumption of good faith' federalism accords legislatures in creating electoral districts and in resolving the 'complex interplay of forces that enter a legislature's redistricting calculus.'" Brief on the Merits for Appellees at 32, *Shaw v. Hunt*, 517 U.S. 899 (1996) (citing Miller v. Johnson, 115 S.Ct. at 2488.)

Second, Appellants now claim that politics is the primary factor causing the location and shape of the 1997 Twelfth District. In 1995 the Court was similarly informed that "politics was a primary factor causing the location and shapes of Districts 1 and 12." Brief on the Merits for Appellees at 35, *Shaw v. Hunt*, 517 U.S. 899 (1996).

Third, Appellants now claim that there was a mix of factors other than race which was the true predominating motivation of the formation of the 1997 Twelfth District. Similarly, Appellants argued to the Court in 1995 that race was not the predominant factor in the formation of the 1992 Twelfth District, but "[i]nstead, the evidence unequivocally establishes that the line drawing process was motivated by six factors operating in tandem." *Id.* at 34.

Fourth, Appellants now claim that one of the major factors in the formation of the 1997 Twelfth District is incumbency protection. In 1995, the Court was similarly informed that one of the major factors in the formation of the 1992 Twelfth District was "the protection of incumbents of both parties." *Id.* at 34.

Fifth, Appellants now claim that the formation of the 1997 Twelfth District was a part of a greater scheme to retain the partisan balance of the previous plan. Similarly, Gerry Cohen, the draftsman of the 1992 plan, testified at the *Shaw* trial that it, too, was constructed to retain the partisan balance of the 1980s. *See* Jt. App. at 809.

Sixth, Appellants now claim that the Twelfth District was formed to be a "Democratic island in a Republican sea." Similarly, the Court was informed in 1995 that the location of the unconstitutional 1992 District 12 is "directly attributable to the decisions of the leadership of the redistricting committees (1) to construct a Democratic district from the Republican leaning counties of the Piedmont . . . ." Brief on the Merits for Appellees at 17, *Shaw v. Hunt*, 517 U.S. 899 (1996).

Seventh, Appellants now claim that even though the 1997 Twelfth District splits all of its counties and cities, great care was taken to avoid splitting precincts. Similarly, in 1995 this Court was told that "neither district [1 or 12] adheres strictly to county, city or town boundaries, but both districts closely adhere to precinct and census block lines." *Id.* at 18.

Likewise in the course of this case, Appellants have recycled their arguments about the communities of interest of the Twelfth District, its "functional" rather than geographic compactness, its racial fairness, its urban, as opposed to rural character, its ease of communication and transportation, and its historic underpinnings in the North Carolina Railroad. *See id.* at 18-24, 34-36.

This remarkable similarity of argument raises the question: If these same defenses did not prevent the 1992 Twelfth District from being found unconstitutional, why should they prevent the 1997 Twelfth District from being found unconstitutional? Furthermore, not only have these defenses covered both the 1992 and 1997 Twelfth Districts, many of them were further recycled to support the 1998 Twelfth District. *See* Ex. 146 (1998 Section 5 Submission). Thus, these boilerplate defenses have been used to defend three different plans. *See* Jt. App. at 500-502. They should fail now as to the 1997 Plan for the same reasons they failed in *Shaw*: the existence of explicit racial targets and the subordination of traditional districting principles to race.

II. NO COMPELLING GOVERNMENTAL INTEREST EXISTS FOR THE 1997 PLAN'S TWELFTH DISTRICT.

Contrary to the position taken by Appellant-Intervenors, Appellant-Intervenors' Brief at 28-31, compelling government interest is not an issue in this case. Neither Appellants nor Appellant-Intervenors ever presented at trial any factual or legal contention that a compelling government interest supported the creation of the Twelfth District in the 1997 Plan. *Cf.* Pleading 160, Final Pretrial Order at 25-27 (claiming a compelling government interest for the First Congressional District). To the contrary, Appellants made quite clear at trial that they were not claiming that the Twelfth District was supported by a compelling interest. There, the Appellants' lead counsel - with

no dissent from Appellant-Intervenors' attorneys who were seated at her side - stated "we're not arguing compelling state interest" with regard to the Twelfth District. Jt. App. at 23-24. Furthermore, counsel for Appellant-Intervenors in his closing argument stated that "[Appellants' lead counsel] covered our position," Jt. App. at 269, and remarked that "once we understood the law after *Shaw v. Hunt*, that there couldn't be - there was no basis for a majority-minority district in the 12th." Jt. App. at 269. *See also* Tr. at 562. Thus, the district court was correct to find that "no evidence of a compelling state interest in utilizing race to create the new 12th District has been presented and even if such interest did exist, the 12th District is not narrowly tailored and therefore cannot survive the prescribed 'strict scrutiny.'" Appellants' J.S. App. at 29a. Because this issue was not raised, and in fact was disavowed by the Appellant-Intervenors at trial, it is not properly before the Court. *See* Jt. App. at 269. "[T]o preserve an argument for appeal the litigant must press and not merely intimate the argument during the proceedings before the district court." *FDIC v. Majalis*, 15 F.3d 1314 (5th Cir. 1994).[40]

Appellant-Intervenors refer to North Carolina's past history of official discrimination against African-Americans and their exclusion from the political process due to state and private action. Appellant-Intervenors' Brief at 30. There is no suggestion in the record that the Legislature in 1997, any more than in 1992, adopted this plan to further "an interest in remedying the effects of past or present discrimination." *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996). In any event, "to alleviate the effects of societal discrimination is not a compelling interest." *Id.* at 909-910 (citing Wygant v. Jackson

---

[40]Nonetheless, Appellees offered substantial evidence at trial of an absence of narrow tailoring. Jt. App. 314-15; Weber dep. 329-30; Tr. 157-68 (Jt. App. 89-94).

Bd. of Ed., 476 U.S. 267, 274-275, 276, 288 (1986)). Nowhere does the State or any other party specifically identify the continuing effects of past discrimination which might constitute a compelling interest or how the Twelfth District of the 1997 Plan is narrowly tailored to achieve it. *Cf. Bush v. Vera,* 517 U.S. 952, 981-82 (1996) (O'Connor, J., plurality opinion). Moreover, there was no *bona fide* claim at trial - nor is there now - that Section 2 or Section 5 of the Voting Rights Act, 42 U.S.C. §1973 (1994), could have supported a new black district in the Piedmont, either in 1992 or 1997. [41]

In fact, Appellant-Intervenors' mistaken suggestion that North Carolina was required to create a race-based Twelfth District amounts to an admission by them that the district had to be - and was - race-based.

---

[41]In addition Appellant-Intervenors have distorted the stipulation as to the relevant *Gingles* factors. *See Thornburg v. Gingles*, 478 U.S. 306 (1986). They have represented to the Court that "[p]laintiffs stipulated for purposes of trial that . . . 2) the white majority votes sufficiently as a bloc to enable it often to defeat the minority's preferred candidate." Appellant-Intervenors' Brief at 11. However, this stipulation was only for the First District in rural, Eastern North Carolina, not the Twelfth in the more urban, Piedmont area. "For purposes of this trial, the parties stipulate and agree that should it become material during the trial with respect to the drawing of the First Congressional District whether these *Gingles* preconditions exist . . . ." Pleading 125, Proposed Discovery Plan of July 14, 1999 at ¶ 8. Thus, the suggestion by the Appellant-Intervenors that these stipulations related to the Twelfth District or the Piedmont area in general is simply not true. Indeed, white crossover voting for black-preferred candidates in general elections for the area of District 12 ranges from a low of 35.1% to a high of 41.8%. Jt. App. 90, 365. *See also* Tr. at 169-70. Also, African-Americans make up a larger share of the District's registered voters than their proportion in the voting age population. Appellants' J.S. App. at 78a-79a.

III. APPELLANTS' DEFENSE OF CLAIM PRECLUSION LACKS MERIT.

For preclusion, Appellants rely on an order entered on September 12, 1997 in the *Shaw* litigation which allowed use of the 1997 Plan as a remedy for the violation of the rights of those *Shaw* plaintiffs who were registered voters in the 1992 Plan's Twelfth District. However, the terms of the order itself make clear that the *Shaw* court did not intend to adjudicate challenges of the constitutionality of the 1997 Plan made by persons who had not been held to be entitled to relief in the *Shaw* litigation. *See* Appellants' J.S. App. at 320a.

In an effort to evade that order and to forum shop, Appellants then moved the *Shaw* court to consolidate and dispose of challenges to the 1997 Plan that were being made in the *Cromartie* litigation and in *Daly v. High*, which also challenged North Carolina's Congressional redistricting as well as its legislative reapportionment. The *Shaw* court summarily denied the State's motion, *see* Jt. App. at 803, and no appeal was taken. That ruling is another bar to Appellants' effort to assert that challenges to the 1997 Plan had to be asserted before the *Shaw* panel in the district court.

In any event, Appellants' defense of claim preclusion is meritless because that defense requires: (1) a final judgment on the merits, (2) the same claim or claims, and (3) the same parties. *Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981); *Cromwell v. County of Sac*. 94 U.S. 351 (1876). Appellants can not establish any of these three elements. The language of the Memorandum Opinion entered by the *Shaw* court on September 12, 1997, makes clear that it is not a "final judgment" as to the constitutionality of the 1997 Plan's Twelfth District. Instead, its language is carefully confined to deciding that the Twelfth District was an adequate remedy for violating the Equal Protection rights of those *Shaw* plaintiffs who resided in the 1992 Plan's Twelfth District. Because the 1997 Plan

removed these persons and their entire county from the Twelfth District, they have no standing and their claim as to the current Twelfth District is non-existent. At least, it is quite different from the claim presented by registered voters from cities and counties cut apart by that District. *Cf. United States v. Hays*, 515 U.S. 737 (1995) (discussing standing rules for *Shaw* plaintiffs). The parties are also not the same. Appellees J.H. Froelich, R.O. Everett, and Ronald Linville were not parties to the *Shaw* litigation; and therefore were not precluded by the *Shaw* panel's order.

Because identity of parties is lacking, Appellants seek to invoke a theory of "virtual representation," contending that the plaintiffs had been "virtually represented" by attorney Robinson O. Everett, who is counsel of record in the *Cromartie* case and had been a plaintiff and counsel in the *Shaw* litigation. However, this contention ignores the circumstance that, under the holding in *Shaw v. Hunt*, 517 U.S. 899, 904 (1996), Robinson Everett lacked standing to be a plaintiff in that case because he did not reside within the 1992 Plan's Twelfth District. Thus, he could not have "represented" the interests of the *Cromartie* Twelfth District plaintiffs, even had he sought to do so. Even if "virtual representation" had existed in this case, the bottom line is that the other two elements of claim preclusion are still lacking. Thus, the Court should reject this defense as has every judge who has ever considered it.

IV. THE DISTRICT COURT ACTED WELL WITHIN ITS EQUITABLE DISCRETION.

Appellant-Intervenors complain that the district court was too slow to schedule discovery, too quick to hold the trial, too slow to issue its opinion, too late to order a remedy, and too intrusive in granting relief. *See* Appellant Intervenors' Brief at 31. However, these are matters well within the equitable discretion of the district court. Moreover, although they cite a

number of cases where district courts, in their equitable discretion, made certain decisions as to the relief granted and the timing involved, they still have not cited any case, nor are Appellees aware of any, where a district court's exercise of its equitable discretion was held to have been abused for enjoining the use of an unconstitutional redistricting or reapportionment plan.

Indeed, "once a State's legislative apportionment scheme had been found to be unconstitutional, it would be the unusual case in which a Court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims,* 377 U.S. 533, 585 (1964). Appellees doubt that in this context "unusual" includes cases in which a state has unduly protracted litigation and has refused to acknowledge the unconstitutionality of its actions.

In 1996, in Texas a primary election was set aside and a special election held in thirteen redrawn districts in conjunction with the high-turnout Presidential election, and a run-off in those few districts which required it. *See Vera v. Bush*, 933 F.Supp. 1341, 1351 (S.D. Tex. 1996), *stay denied sub nom. Bentsen v. Vera*, 518 U.S. 1048 (1996). In North Carolina an injunction prohibiting use of the 1997 Plan took effect in April 1998, closer to the primaries than the injunction entered by the court below after the trial. Moreover, the 1998 plan was enacted later in May 1998; but nonetheless in the districts affected primaries were conducted in September and general elections were held at the regular time in November. In this case, had a stay order not been entered, a primary in the districts affected by the invalidation of District 12 could have been accomplished in conjunction with the statewide second primary which was scheduled for May 30, 2000.

Neither Appellants nor Appellant-Intervenors have any legal basis for their extraordinary contention that this Court

should preempt the exercise of the district court's equitable discretion. *See Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). Generally, "[o]nce a constitutional violation has been found, a district court has broad discretion to fashion an appropriate remedy." *Karcher v. Daggett*, 466 U.S. 910, 910 (1984) (Stevens, J. concurring). This discretion is usually entrusted to the district court in the first instance. *See Perkins v. Matthews*, 400 U.S. 379, 396-97 (1971). In light of all the circumstances here, including Appellants' unwillingness to remedy their racial gerrymandering, no basis exists to overturn the district court's decision.[42]

CONCLUSION

Appellants and their allies seek to overturn *Shaw v. Reno*, 509 U.S. 620 (1993), or failing that, to introduce such limitations on its application as to make it a dead letter. However, the values protected by *Shaw* are fundamental and should not be ignored. Nor should the tactics of Appellants in seeking to avoid the teachings of *Shaw* be endorsed. While the authority of a state legislature should not be minimized, neither should the role and responsibility of the federal courts be disregarded in protecting the right to vote - the most fundamental right of citizenship in our republic.[43] Appellants'

---

[42]Appellants and Appellant-Intervenors seek to raise an issue as to the exercise of discretion of the lower court if the Court upholds its judgment that the Twelfth District is unconstitutional. That issue is premature and should instead be considered by the lower court.

[43]Because of the importance of voting rights in a democracy, Appellees submit that those rights deserve the protection afforded by the approach used in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), where racial motive need not be shown to be the predominant motive but only a cause. 429 U.S. 252 (1977). Likewise, the State should bear the burden of proving that the "taint" of a racial

massive resistance to the teachings of *Shaw* should not be rewarded or tolerated. Instead, the judgment of the district court should be affirmed.

Respectfully submitted,

MARTIN B. MCGEE
WILLIAMS, BOGER
GRADY, DAVIS & TUTTLE
708 McLain Rd.
Kannapolis, NC 28081
(704) 932-3157

ROBINSON O. EVERETT*
SETH A. NEYHART
EVERETT & EVERETT
P.O. Box 586
Durham, NC 27702
(919) 682-5691

DOUGLAS E. MARKHAM
P.O. BOX 130923
Houston, TX 77219-0923
(713) 655 - 8700

*Counsel of Record

Attorneys for Appellees

October 6, 2000

---

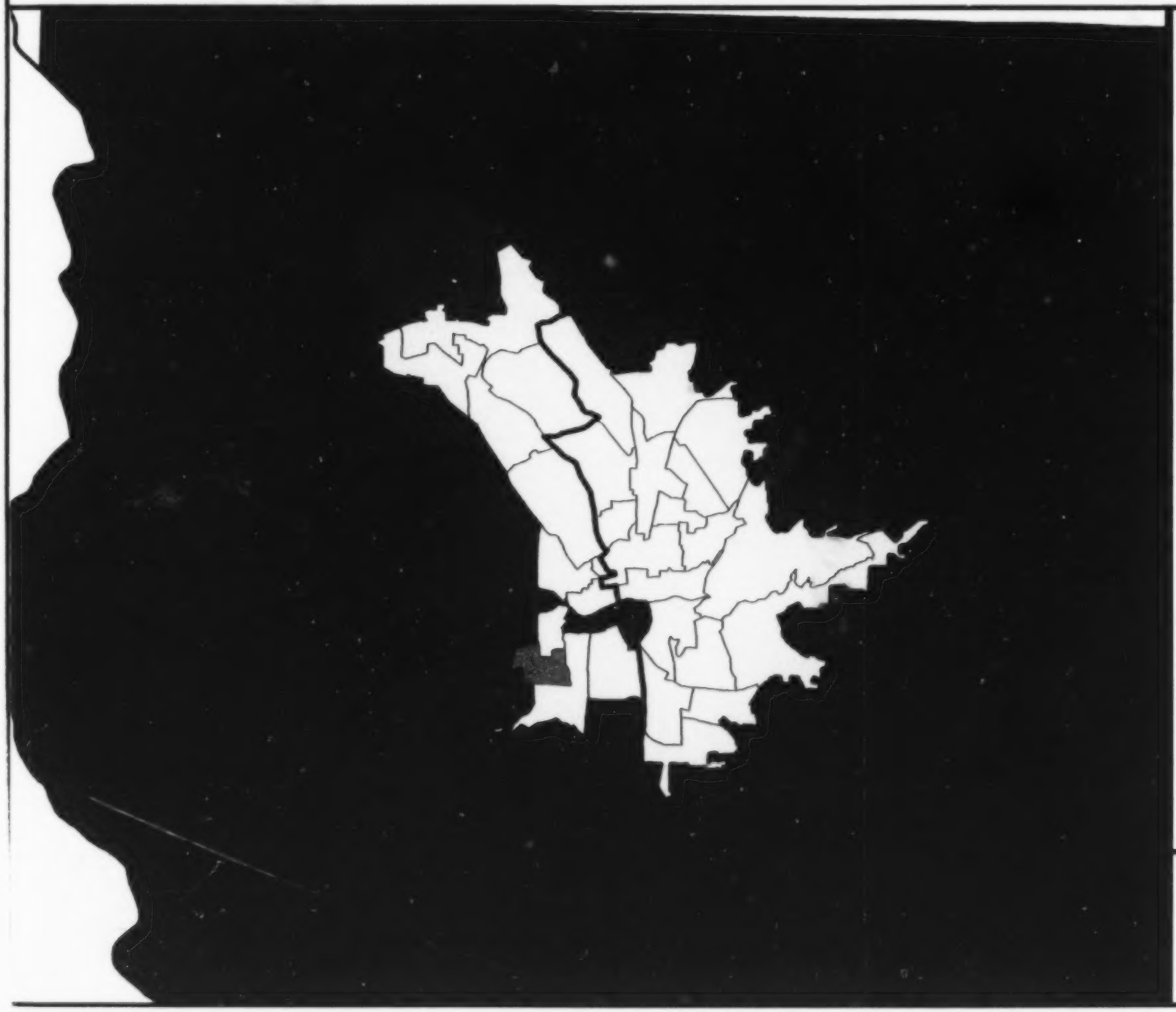
gerrymander has been removed. However, in this case, the evidence of racial intent is so strong that the burden of proof is immaterial to the correct outcome.

APPENDIX

Georgia Congressional District Boundaries
Effective 1996

Copyright © 1997 by Election Data Services, Inc.
(Used with permission)

Republican Victories in Forsyth County for All Precincts

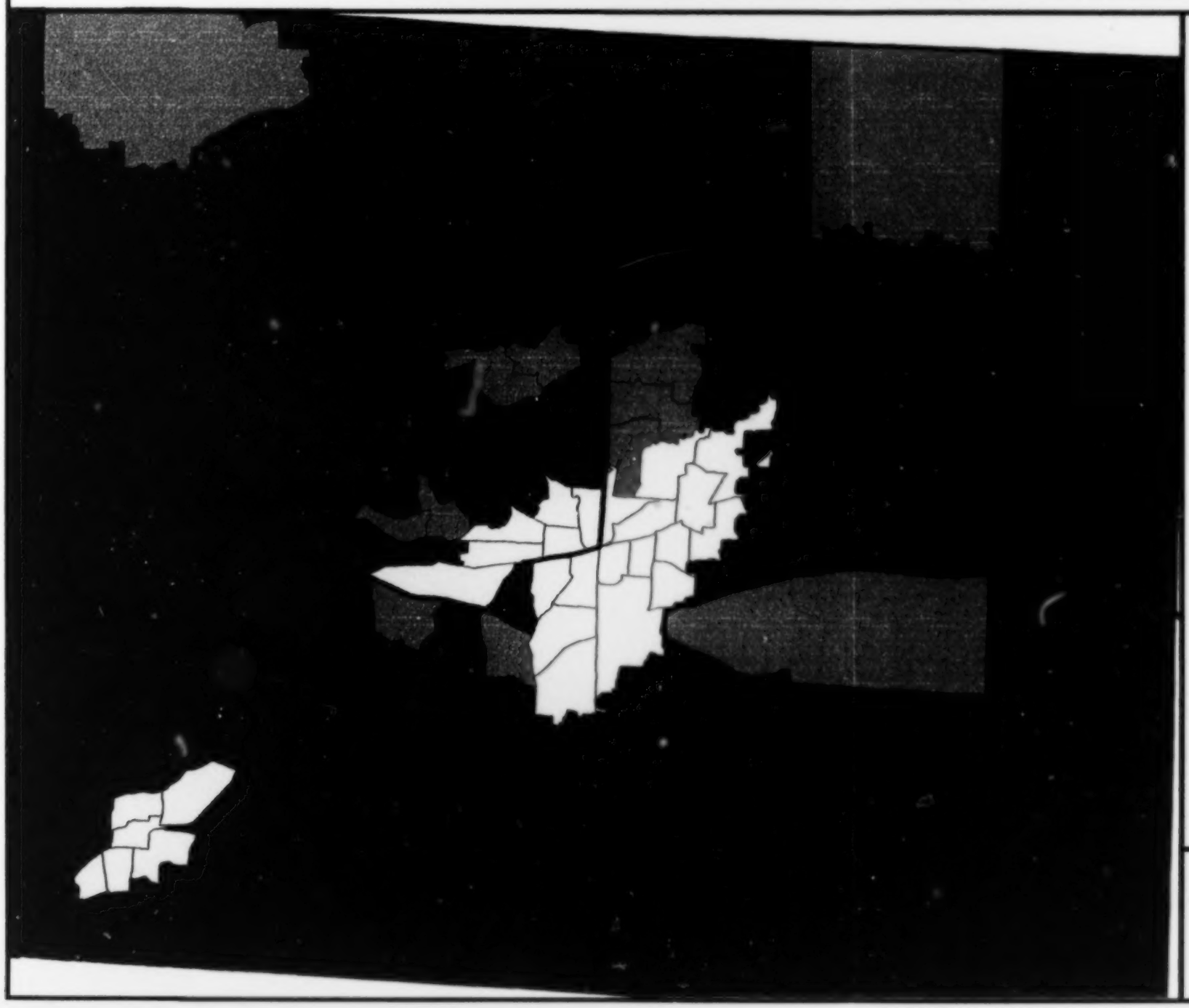


Legend

- Counties
- Precincts
- 97 Congressional District 12
- 3 Republican Victories
- 2 Republican Victories
- 1 Republican Victory
- 0 Republican Victories

N.C. General Assembly,
Information Systems Division

Republican Victories in Guilford County for All Precincts

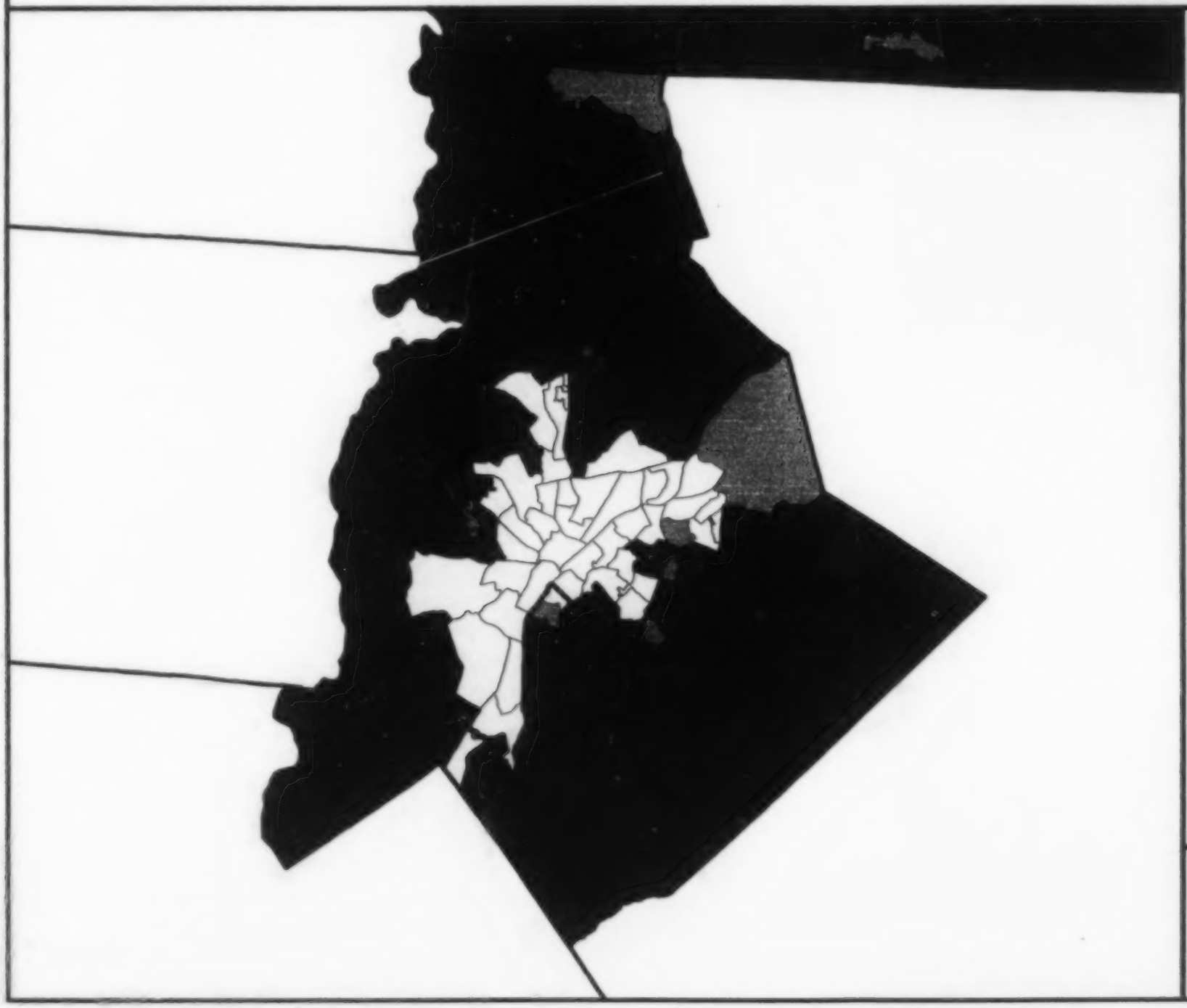


Legend

- Counties
- Precincts
- 97 Congressional District 12
- 3 Republican Victories
- 2 Republican Victories
- 1 Republican Victory
- 0 Republican Victories

N.C. General Assembly,
Information Systems Division

Republican Victories in Mecklenburg County for All Precincts



Legend

- Counties
- Precincts
- 97 Congressional District 12
- 3 Republican Victories
- 2 Republican Victories
- 1 Republican Victory
- 0 Republican Victories

N.C. General Assembly,
Information Systems Division

APPELLEES' OBJECTION AS TO AUTHENTICITY AND ADMISSIBILITY OF MAPS ORIGINALLY APPEARING IN APPELLANTS' BRIEF ON THE MERITS AT 1a-3a.

Appellees hereby object to the authenticity of three maps appearing in the appendix to Appellants' Brief on the Merits at 1a-3a. These appeared for the first time in this lawsuit in Appellants' Brief on the Merits and were never placed into evidence or subjected to the evidentiary review of the district court.

These maps purport to be drawn on the basis of Joint Exhibits 107-109, which Appellants have lodged with the Court. Joint Exhibits 107-109, *inter alia*, depict the Democratic Party registration percentages by precinct for Forsyth, Guilford, and Mecklenburg Counties, with the boundary of the Twelfth District overlaid. The legend for the Appellants' new maps indicate that the precincts are to be marked red and not blue if they are "District 12 Precincts With Lower Democratic Registration Than One or More Adjacent Non-District 12 Precincts." Appellants' Brief on the Merits at 1a-3a.

Appellees' counsel, upon examination of Exhibits 107-109, determined that at least five precincts in these maps are colored in error. Moreover, the errors consistently support the Appellants' position, i.e. precincts are marked blue which according to the legend should be red.

In Guilford County, Ex. 107, Greensboro 33 has a Democratic registration number of 66.162% and is adjacent to a precinct outside of District 12 with a Democratic registration number of 66.22%. Greensboro 36 has a Democratic registration number of 52.279% and is adjacent to a precinct outside of District 12 with a Democratic registration number of 59.679%. Jamestown 2 has a Democratic registration number of 47.21% and is adjacent to a precinct outside of District 12

with a Democratic registration number of 47.989%. Finally, Jamestown 1 has a Democratic registration number of 44.74% and is adjacent by point contiguity to a precinct outside of District 12 with a Democratic registration number of 45.102%. Appellants colored these four precincts blue and not red. *See* Appellants' Brief at 2a.

In Mecklenburg County, Ex. 109, Charlotte 61 has a Democratic registration number of 57.883% and is adjacent to a precinct outside of District 12 with a Democratic registration number of 59.098%. CO2 has a Democratic registration number of 47.954% and is adjacent to a precinct outside of District 12 with a Democratic registration number of 54.498%. It also borders two additional precincts outside of District 12 with Democratic registration numbers of 51.258% and 49.592%. Appellants have colored these precincts blue and not red. *See* Appellants' Brief at 3a.

Appellees' counsel called some of these errors to the attention of lead counsel for Appellants in a letter dated September 25, 2000 and requested her to take steps to correct these maps. She declined to do so. In a letter dated September 27, 2000, she informed counsel for appellees of her belief that "the illustrations are accurate." She wrote that "[w]ith regard to the four questioned precincts, it appears that you contend there should be an additional category of precincts depicted, *i.e.* precincts which also share a small portion (less than one-half) of their boundaries with an adjacent non-District 12 precinct with a higher Democratic registration." Accordingly, she informed counsel for Appellees that "your demand that the maps be 'corrected' to include additional information is unreasonable and unnecessary."

Appellees have not demanded or asked the Appellants to add or subtract a category of precincts to their maps, nor do Appellees believe they have a right to do so. Rather, Appellees have only requested that every precinct colored in Appellants' maps be colored correctly and accurately according to the

categories stated in their legend. Moreover, one of the erroneously colored precincts, CO2 in Mecklenburg County, is bordered by not only one, but three precincts outside of District 12 that have higher Democratic registration numbers.

For the above stated reasons, Appellees object to the authenticity of these maps and respectfully pray the Court that they not be considered unless corrected.

Supreme Court, U.S.
FILED
NOV 8 2000
CLERK

Nos. 99-1864 and 99-1865

IN THE

Supreme Court of the United States

JAMES B. HUNT, JR., *et al.*,

Appellants,

and

ALFRED SMALLWOOD, *et al.*,

Intervenor-appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

STATE APPELLANTS' REPLY BRIEF

MICHAEL F. EASLEY
North Carolina Attorney General
Tiare B. Smiley,* Special Deputy Attorney General
Norma S. Harrell, Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919) 716-6900

Walter E. Dellinger
Brian D. Boyle
Sri Srinivasan
Jonathan D. Hacker
O'Melveny & Myers LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

November 8, 2000

**Counsel of Record*

250ptf/0

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTRODUCTION AND SUMMARY 1

ARGUMENT 3

I. THE SHAPE AND COMPACTNESS OF DISTRICT 12 ONLY RAISES THE QUESTION PRESENTED 3

II. APPELLEES' STATISTICAL EVIDENCE DOES NOT CALL INTO QUESTION THE POLITICAL EXPLANATION FOR THE DISTRICT 12 LINES 4

III. THE "DIRECT" EVIDENCE DOES NOT SUPPORT THE COURT'S FINDINGS 13

IV. APPELLEES' CHALLENGE TO DISTRICT 12 IS BARRED BY ESTABLISHED PRINCIPLES OF CLAIM PRECLUSION 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Bush v. Vera,
517 U.S. 952 (1996) ..... passim

Church of Lukumi Babalu Aye, Inc. v. Hialeah,
508 U.S. 520 (1993) 14

Federated Dep't Stores v. Moitie,
452 U.S. 394 (1981) 18, 19

Gaffney v. Cummings,
412 U.S. 735 (1973) 3

Kelley v. Everglades Drainage Dist.,
319 U.S. 415 (1943) 1

Michael M. v. Superior Court of Sonoma County,
450 U.S. 464 (1981) 5

Miller v. Johnson,
515 U.S. 900 (1995) 4, 13, 14

Pacific Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n,
461 U.S. 190 (1983) 14

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 16

Reeves v. Sanderson Plumbing Prods., Inc.,
120 S. Ct. 2097 (2000) 5, 17

Shaw v. Hunt,
517 U.S. 899 (1996) 13, 16, 17

Shaw v. Hunt,
CA No. 92-202-CIV-5-BR,
Order (E.D.N.C. June 9, 1997) 19

United States v. O'Brien,
391 U.S. 367 (1968) 14

TABLE OF AUTHORITIES
(continued)

OTHER AUTHORITIES

18 James W. Moore et al., Moore's Federal Practice ¶ 131.21[3][a] (3d ed. 1997) 19

18 C. Wright et al., Federal Practice and Procedure § 4428 (1981) 19

INTRODUCTION AND SUMMARY

A single theme emerges from appellees' brief in response, and it is one we wholeheartedly endorse: the district court's finding that the North Carolina General Assembly was motivated predominantly by race in the design of District 12 is not supported by the record facts on which the district court relied. Our opening brief detailed the reasons why each of the record cites identified by the court in its analysis of the district demographics failed to support an inference of predominant racial motive. Not once in their brief do appellees attempt to rehabilitate the court's own citations, and the record evidence appellees do cite to support the court's analysis of the demographics was *not*, in fact, relied upon by the district court. Appellees' implicit concession that the evidence on which the court actually relied failed to support its findings should be enough in and of itself to warrant reversal; evidence the court did not rely on ought not be the basis for affirmance, since we cannot know whether the district court itself thought that such evidence supported its findings. *See Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 420-21 (1943) (refusing to consider "facts which might have been considered [by the district court], but which are nowhere referred to in the opinions or findings below"). In any event, as we elaborate in this brief, the evidence on which appellees now choose to rely provides no more support than that on which the court below relied.

Appellees spend most of the first part of their brief proving nothing more than the predicate for the case, *viz.*, that the "towns and counties" that make up District 12 appear to be divided along racial lines. That is not disputed here, but it also is not disputed that those same towns and counties *also* appear to be divided along political lines: the heavily Democratic precincts are in, and less Democratic precincts are out. In the teeth of that evidence, the district court found that the statistical evidence "utterly failed" to support a political

explanation for the district lines. J.S. 26a. But even appellees cannot bring themselves to defend *that* finding – contrary to the district court, appellees argue only that the lines correspond "more precisely" to racial than to political demographics.

On its face evidence that district lines merely correspond "more precisely" to racial than political demographics is hardly the kind of strong showing needed to justify a finding of racial predominance in the context of electoral districting. It is also wrong. Every heavily African-American precinct in the district is *more* Democratic than any "white" alternative outside the district, and, more generally, almost every precinct just inside the border of the district is more Democratic than its neighbors just outside the border. The district lines, in other words, are wholly consistent with a desire to maximize Democratic representation in the District.

To try to prove otherwise, appellees are forced to argue on the one hand that the General Assembly made the district *too* Democratic to have been truly motivated predominantly by politics, and on the other hand that the Assembly did not make the district Democratic *enough* to have been truly motivated predominantly by politics. As it happens, appellees are wrong on both counts, but there is a deeper point: under appellees' "heads-I-win/tails-you-lose" model for proving discrimination in electoral districting, no State legislature is safe from a finding of race discrimination when it tries to draw a partisan-based district anywhere race and political behavior are closely aligned. Appellees' argument confirms the danger of freewheeling inquiries into legislative motivation in this context in particular.

Lacking support in the statistical evidence, appellees' attempt to prove a predominant racial motivation boils down to three pieces of "direct" evidence of legislative intent. But this evidence in fact sheds only the weakest *indirect* light on the motives of the General Assembly that enacted the 1997

statute, unlike the truly direct evidence of State motive in this Court's previous *Shaw*-type cases.

Finally, appellees do not offer any truly substantive response to our showing that their claims here are barred by routine application of the principles of claim preclusion.

ARGUMENT

I. THE SHAPE AND COMPACTNESS OF DISTRICT 12 ONLY RAISES THE QUESTION PRESENTED

Appellees begin their defense of the district court's findings with a lengthy discussion of the District 12's compliance with traditional districting criteria, such as compactness, political subdivisions, and communities of interest. Appellees' Br. at 14-19, 23-25. But it is not disputed that traditional districting criteria alone do not fully explain the shape of the district.[1] The question is whether the other factors explaining the district lines were predominantly racial or political. "The Constitution does not mandate regularity of district shape," *Bush v. Vera*, 517 U.S. 952, 962 (1996) (plurality op.), and a "State may draw irregular district lines in order to allocate seats proportionately to major political parties," *id.* at 964-65 (citing *Gaffney v. Cummings*, 412 U.S. 735, 751-54 & 752 n.18 (1973)). For those reasons, "the neglect of traditional districting criteria is merely necessary [to invoke strict scrutiny], not sufficient." *Id.* at 962. What the plaintiffs must prove is that those criteria were subordinated *to race*, *id.*, and *not* to the "legitimate state goal" of "incumbency protection," *id.* at 964; *see id.* at 979.[2]

---

[1] Appellees cannot contest, however, the significant improvements in the appearance of the district over its 1992 counterpart, and the record is undisputed that the drafters tried wherever possible not to depart from traditional principles: shortening and widening the district, not splitting precincts and recognizing communities of interest.

[2] Appellees quote two floor statements of Senator Cooper suggesting that the 1997 plan was "not an incumbent protection plan." Appellees'

II. APPELLEES' STATISTICAL EVIDENCE DOES NOT CALL INTO QUESTION THE POLITICAL EXPLANATION FOR THE DISTRICT 12 LINES

Moving past the departures from traditional districting criteria and on to the possible explanations for those departures – the question in this case – appellees, like the district court, place the bulk of their emphasis on a statistical analysis of the district's lines. From the very outset, however, appellees have a fundamental disagreement with the district court's analysis. The district court found that the political explanation, as a statistical matter, "utterly failed" to explain the shape of the district, J.S. at 26a, and that splits in the counties and towns that make up District 12 "*invariably* occur along racial, rather than political, lines," J.S. at 26a (emphasis added). Appellees, by contrast, readily acknowledge that "some correlation exists between party and the boundaries of the Twelfth District," Appellees Br. at 21, and argue only that the district lines "more precisely correlate" with race than with politics. Appellees' Br. at 18; *see id.* at 21, 22, 23.

The difference is more than semantic. The district court implicitly recognized that, in view of this Court's admonition that courts must exercise "extraordinary caution" before concluding that a majority of a State legislature was motivated predominantly by race in the design of a particular district, *Miller v. Johnson*, 515 U.S. 900, 916 (1995), appellees must do more than show that race is a slightly better – "more precise" – statistical explanation of the district lines than incumbency protection. To allow a factfinder to infer racial

Br. at 43 (quoting J.A. 398, 477). Appellees' quotations are misleading: as their full context reveals, Senator Cooper is merely objecting to the *label*. The very next sentence in one of his statements shows that the distinction is largely semantic: "This is a plan that attempts to preserve the partisan nature of each of the twelve districts as they now exist." J.A. 477.

predominance when the statistical evidence is in near equipoise would create a very high risk of error, especially where, as here, there is an extremely strong pattern of Democratic voting behavior among African-Americans. To avoid that risk in these kind of circumstances, plaintiffs seeking to prove legislative motivation primarily on the basis of demographic statistics should be required to prove that incumbency protection statistically *fails* as an explanation of lines that otherwise seem to track racial populations.[3]

The Court need not resolve this question here, however, for appellees' statistical evidence did not even succeed in the lesser showing that race was a "more precise" explanation for the district lines. To begin with, we showed in our opening brief that none of the statistical evidence actually relied upon by the district court supported its conclusion of racial predominance. State Br. at 25-33. Remarkably, appellees make no effort to show otherwise. Ignoring the evidence on

[3] Appellees mischaracterize our discussion of their burden as requiring proof "that race was the only motive and not merely the predominant motive." Appellees' Br. at 11 n.12. Our point is more modest, but not unimportant: where, as here, plaintiffs seek to prove discrimination in part through *indirect* evidence – such as demographic statistics – that evidence must do more than establish the *possibility* of a predominant racial motive. The statistical evidence must actually *disprove* the possibility that the asserted reason was the true predominant reason. *See, e.g.*, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 470 (1981) (the "asserted reason for the enactment of a statute may be rejected, if it *could not have been* a goal of the legislation" (emphasis added; internal quotation marks omitted)). Only then is the factfinder entitled (though still not necessarily compelled) to decide that the other proffered motive (*i.e.*, race) was the true predominant motive. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2108 (2000). If, as is true here, the statistical evidence does not even call into question the political explanation, that evidence cannot be relevant to the question of which of the two statistically possible explanations is the real one. A plaintiff may still try to prove that race was the predominant motive through direct evidence, but that evidence then must be sufficient in and of itself to justify such a finding.

which the court did rely, appellees instead point to maps, charts, and expert testimony on which the district court did *not* rely, and even to theories of motive never presented to nor considered by the district court in reaching its conclusions. *See* Appellees' Br. at 22-23, 26-27, 29-30.

These efforts at avoidance are unavailing, for two reasons. First, because the court itself did not discuss or even cite the evidence on which appellees rely, we cannot know whether the court itself believed that that evidence actually supported its findings. Indeed, it is possible that the court's refusal to rely on the evidence discussed in appellees' brief reflects its own implicit conclusion that the evidence does *not* support its findings.

Second, and in any event, the statistical evidence to which appellees advert on appeal suffers from precisely the same flaws as the evidence actually relied upon by the district court.

1. Appellees begin by citing – without discussing – a clutch of exhibits, charts, maps, and testimony, all of which, we are told, show that race explains the district better than politics. Appellees' Br. at 22-23. But upon closer scrutiny, all of these items show only one thing, in different ways: heavily African-American precincts are almost always assigned to District 12, whereas strongly Democratic "white" precincts are *not* always assigned to the district. That is perfectly true, but also beside the point, for a simple reason discussed at length in our opening brief, but ignored by appellees: it is an undisputed fact that every heavily African-American precinct inside District 12 is *more reliably* Democratic than the "white" precincts outside the District. J.A. 140, 156. Appellees do not even try to point to a single precinct that could have displaced a heavily African-American precinct in District 12 with a predominantly white *but equally or more Democratic* precinct. And the precincts just inside the border – without regard to racial demographics –

are also consistently more Democratic than those outside the border. *See* J.A. 490, 491, 492.[4] As the *Bush* plurality explained, "looking at totals, rather than at the difference between areas just inside and just outside the district lines, is misleading." *Bush*, 517 U.S. at 972 n.*. That is because evidence focusing on border precincts often better proves the predominance of race by showing that district lines were "finely drawn to maximize the minority composition of the district." *Id.* In this case, however, the border precinct evidence confirms that the lines were finely drawn to maximize the *Democratic* composition of the district.[5]

---

[4] There are a few isolated exceptions, but only where the less Democratic precinct had to be included over the alternative for reasons of population equity, shape, or the interests of incumbents in adjacent districts. J.A. 613-14, 622, 625; J.S. 207a-209a. What is more, there are no more such "divergences" in voting behavior comparisons than when the racial populations of border precincts are compared. J.A. 247, 568-69; J.A. 123 (Weber testimony). That is to say, the precincts just inside the border are more Democratic than those just outside about as often as the precincts just inside the border are more African-American than those just outside – confirming that race cannot be shown statistically to predominate in the drawing of the district lines.

[5] The comparison between maps showing racial demographics and those showing voting results, cited at length at Appellees Br. at 23, exemplifies the failure of the evidence on which appellees rely. If one ignores the actual Democratic voting behavior of the precincts assigned into and outside the district, the district lines might appear to track racial population more closely than voting behavior in certain places, because the voting behavior maps show several areas outside the district with strong Democratic voting performances. What the maps fail to reveal is that the precincts inside the border in these areas are almost always more strongly Democratic than those outside, with certain fully explainable exceptions, *see supra* note 4.

Similarly, while appellees contend that a chart of precinct assignments in the split counties reveals "a startling contrast between assignment correlated to race and correlated to the four measures of party affiliation," Appellees Br. at 22 (citing J.A. 515), that chart, in fact, reveals nothing of the sort. It compares the assignment of precincts that are more than 40% African-American (which are almost always assigned to Dis-

2. Appellees, like the district court, ultimately recognize that statistical evidence regarding the exclusion of some "white" Democratic precincts cannot alone carry the day in the face of undisputed evidence that not one of those precincts was as Democratic as the "black" precincts that were included. Thus, appellees, like the district court, are forced to argue that, to protect incumbent Representative Mel Watt, the General Assembly did not actually *need* to include as many reliably Democratic precincts as it did; *ergo*, they reason, the Assembly must have been motivated by race and not incumbency protection. Appellees' Br. at 26 ("the explanation that the district was constructed for a Democrat to win is probably inaccurate if the district is 'safer' than necessary for any Democrat to win"). That reasoning is flawed in general and in every particular.

To begin with, the argument that District 12 is "too safe" is, in truth, not a statistical argument at all. It reflects a normative judgment in respect to the number of reliable Democratic voters necessary to make a given district appropriately "safe." And while appellees and their expert witness are quick to opine as to what *they* think makes a district safe enough, they do not even attempt to point to any general criteria lower courts can use to evaluate, and second-guess, a sovereign State's determination as to the appropriate number of partisan voters necessary to establish a safe district.

---

trict 12), on the one hand, with precincts that are more than 40% Democratic (which are only assigned to District 12 about half the time), on the other. That comparison says nothing about the State's motivation, however, given that those African-American precincts are also *much more* Democratic than others. What is more, the chart also shows that the vast majority of precincts in the split counties are more than 40% Democratic; obviously not *all* of those could be assigned to District 12, but in fact more than half were. By contrast, less than 20% of the precincts are more than 40% black, and the fact that virtually all of them are assigned to District 12 is explained entirely by their high proportion of Democratic voters.

In this case, appellees point only to other plans that, they say, would *also* have been "safe" for a Democrat. Appellees' Br. at 26. Once again, they rely exclusively on evidence on which the district court did not rely: "the 1998 plan and draft plans dated as far back as 1995." Appellees' Br. at 26. The district court cited none of those plans in support of its findings.[6] More important, appellees make *no* effort to demonstrate that those alternative districts were sufficiently safe to protect the District 12 incumbent. The district court's findings were expressly predicated on appellees' expert's opinion that 60% single-party representation was the "optimum" level for making a district "safe," but appellees do not even try to respond to the fact that District 12 was just three percentage points above that figure, and that two other, Republican districts were *also* above the 60% figure. State Br. at 27.

Tacitly acknowledging the failure of evidence actually cited by the district court, appellees again point to entirely different evidence, and labor to produce a wholly new explanation for the assignment of African-American precincts to District 12. As appellees now see things, the State was attempting to maximize the number of African-American voters likely to vote in a Democratic *primary*, which (appellees say) would essentially guarantee an African-American Democratic candidate, who could then be expected to prevail in a general election in the heavily Democratic district. There are at least two problems with this theory. First, it has nothing whatever to do with the district court's findings of racial predominance, which did not turn in any respect on (or even mention) the racial demographics of primary voters. Appellees did not urge this theory before the district court, and the district court did not perform, *sua sponte*, the complicated

---

[6] Appellees' argument that the 1998 plan was a viable, non-racially motivated alternative rings especially hollow, given that they themselves challenged the 1998 plan, too, as an unconstitutional racial gerrymander.

calculations on which appellees' theory depends. Appellees Br. at 26-27 & n.24. Second, even if the district court *had* considered primary voter racial demographics in making its findings, there is not one shred of evidence in the record that *the State* considered such information in designing District 12, much less any hint that the State acted on the basis of such calculations.

3. Having failed to justify the court's inference of a predominant racial motive on the ground that District 12 was *too* Democratic for partisanship to explain the district lines, appellees immediately turn 180 degrees and argue that the statistics *also* show, to the precise contrary, that the district is *not Democratic enough* for politics to explain the district lines. Appellees' Br. at 29-31. Putting to one side for the moment the merits of their discussion on the latter point, it must be noted up front that, if countenanced here, this extraordinary method of proof will put State legislatures in a virtually inescapable box any time they try to maximize partisan representation where race and partisan voting patterns correlate closely. When a district is slightly more partisan than it "should" be if partisanship explains the district, the State risks losing a challenge to the district; but if the State tries to avoid that risk by making the district less partisan, it risks going slightly too far, and then losing a challenge because the district is not partisan enough. It is hardly "sensitive to the complex interplay of forces that enter a legislature's redistricting calculus," *Bush*, 515 U.S. at 915-16, to subject States' efforts to redraw district lines to that sort of litigation whipsaw.

Fortunately, in this case at least, appellees' attempt to prove that a different, more Democratic district could have been drawn, Appellees' Br. at 30 & n.25, fails on its own terms.[7] On appeal these efforts are based primarily on maps

[7] Contrary to appellees' assertion, nobody contends that plaintiffs in all *Shaw* cases "must show how to construct a more politically gerrymandered district." Appellees' Br. at 29. In *this Shaw* case, however, it is the plaintiffs who have sought to prove that the State's asserted political motive was pretext by showing that if politics was the true motive, different district lines would have been drawn.

appended to their brief that "show some precincts outside the district which voted for the Democratic candidate in all three elections . . . and some precincts inside the district which vote Republican in the same group of elections." *Id.* at 30. These maps, appellees contend, "make clear that a swap could occur," *id.* – *i.e.*, the precincts that voted Republican could have been removed and replaced with precincts with similar populations that voted Democratic, thus making the district more Democratic. The fact that the General Assembly did not make these choices, appellees argue, justifies the district court's conclusion that race must have been the predominant motive. Appellees are wrong.

First, appellees here – as almost everywhere else in their brief – rely exclusively on evidence the district court did *not* rely on in making its findings. The only things the court *did* rely on – what the court in fact said was "[o]f particular note" in respect to the State's motivation, J.S. 26a – were Dr. Weber's suggestion that a single split precinct (Precinct 77) could have been kept whole, and that a few Mecklenburg precincts could have been shifted from District 12 into District 8. *See* State Br. at 30-33.[8] Although the court explicitly identified these facts as especially important to its finding of a predominant racial motivation, appellees do not contest the showing in our opening brief that Dr. Weber's suggestions were not realistic and workable alternatives. *Id.*

Second, not only did the district court *not* rely on the alternatives appellees now propose; it *could not* have relied on

[8] In fact, not even Dr. Weber argued that his proposed alterations to the district lines would have made the district more Democratic. To the contrary, he argued that it would be less Democratic, but more compact. *See* State Br. at 31-32 (discussing Weber's alternatives).

those alternatives because neither the maps, nor their underlying data, were presented to the district court.

Third, in arguing for the first time on this appeal that these alternatives establish proof of the State's predominant racial motive, appellees make no effort to defend or justify the alternative proposals in terms of the range of geographic and political factors the State would have had to consider in deciding whether the lines appellees now propose would have satisfied all of the State's many needs in redistricting. A court, however, must consider "whether race predominated in the redistricters' actions *in light of what they had to work with*." *Bush*, 517 U.S. at 972 n.* (emphasis in original). It is precisely such evidence of context, for example, that refuted the Weber alternatives on which the district court relied and which appellees have chosen not to defend. But because appellees did not present these other alternative possibilities below, the record is devoid of evidence as to all the various factors the General Assembly would have "had to work with" in respect to the lines appellees now suggest. Such lines therefore can have no weight at all in determining, on appeal, whether the district court's finding of racial predominance is supportable.[9]

Finally, then, appellees are reduced to suggesting that the State should have extended the district an additional twenty miles to either "Burlington or Gastonia in a manner not unlike the 1992 Twelfth District." Appellees Br. at 30. Appellees argue, in other words, that the General Assembly's decision not to draw a district that looked *more* like the district invalidated in *Shaw* itself proves that the Assembly must have been motivated predominantly by race in drawing *this* much more compact, less minority district. This argument cannot be taken seriously, except insofar as it exposes the logically absurd limit of appellees' efforts to prove racial predominance by casting about for possible alternative district lines that *could* have been drawn to create a Democratic district. What these efforts principally show is that a mathematically near-infinite number of hypothetical alternative lines could be drawn to fulfill any one stated goal. Most States, however, do not redistrict in the realm of the mathematically abstract. They are, this Court has recognized, constrained by a wide variety of considerations that must be taken into account at every potential turn in the district lines, and this Court has emphasized that, contrary to the theory of appellees' case here and to the findings of the district court, courts must give substantial deference to any State's efforts to balance all those considerations.

[9] Lest we leave the mistaken impression that appellees' proposals likely would have been shown to be workable, we note that appellees' primary alternative proposal – to delete the High Point precincts, Appellees' Br. at 30 n.25 – was not viable, for it would have defeated the State's goal of improving the shape of the district in comparison to its 1992 counterpart. The map appended to this brief reflects appellees' proposed alternative; as that map shows, their proposal would have left the district held together by a narrow thread, a feature of the 1992 plan the State consciously sought to avoid.

III. THE "DIRECT" EVIDENCE DOES NOT SUPPORT THE COURT'S FINDINGS

As discussed above, *supra* note 3, where the indirect, statistical evidence fails to rebut the State's assertion that it was predominantly motivated by legitimate, nondiscriminatory considerations, the direct evidence must be sufficient in and of itself to establish that such considerations were *not* predominant and that race was. In cases like *Bush v. Vera*, *Miller v. Johnson*, and *Shaw v. Hunt*, such proof was clear: the State in each case explicitly conceded that the district at issue was drawn to maximize minority voting power and/or to satisfy the Justice Department's demand for an additional majority-minority district. *See* State Br. at 19-20 (discussing cases). Appellees cannot – and do not – deny that that the evidence of legislative motive in this case does not even be-

gin to compare with the evidence in this Court's other *Shaw*-type cases.

Unlike the concessions in earlier cases, none of the "direct" evidence cited by appellees here actually says anything *direct* about the motives of the General Assembly members who voted for the statute.[10] At the very most, the e-mail from Gerry Cohen to Senator Cooper, and Senator Cooper's two individual floor comments, provide only *indirect* evidence as to what motivated the lawmakers who actually enacted the 1997 redistricting statute. The proper question, then, is whether the few, individual statements on which the district court relied for its broad inference of legislative motive in respect to District 12's lines are, of themselves, sufficient to satisfy the "demanding" showing in respect to *legislative* motivation required to prove a *Shaw* claim. *Miller*, 515 U.S. at 928 (O'Connor, J., concurring).

1. Turning first to the Cohen e-mail, appellees argue that this evidence proves the General Assembly's motives because it is a "view behind the scenes" of the redistricting process. Appellees' Br. at 34. But the e-mail was sent only to two legislators; there is no evidence that any others ever saw the e-mail. Appellees nevertheless contend that the e-mail reflects a "snapshot view of a *Miller* violation in pro[gr]ess," *id.* at 35, because it proves that a "significant

[10] *See United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); *accord Pacific Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 216 (1983); *cf. Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring and dissenting) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body . . . and this Court has a long tradition of refraining from such inquiries."). As appellees themselves put it, "the ultimate question is still the legislative intent, and not the subjective intent of Senator Cooper." Appellees' Br. at 39.

number of voters" were moved into District 12 on the basis of their race, *id.* The Cohen e-mail proves no such thing. First, appellees rest their contention on the misleading statement that "the entire e-mail is primarily a discussion of race and racial percentages for the First as well as the Twelfth District." Appellees' Br. at 35. In fact, the e-mail – the entirety of which appears at J.A. 369 – discusses District 1 almost exclusively. And the e-mail does indeed discuss precise racial percentages in respect to District 1, because the State *was* trying to establish a minority-majority in that district, as the State has acknowledged all along. *See* J.S. 31a-35a (district court upholding predominant use of race in design of District 1 to satisfy V.R.A. § 2). It is only after the long District 1 discussion that Cohen adds a single oblique reference to moving the Greensboro black community into District 12.

Second, on its face that oblique sentence only *describes* some of the voters shifted by a change in the new draft plan – it does *not* say those voters were moved into the district *because of* their race. Moving those voters also served the State's legitimate and consistently applied goals of preventing a three-way split of Guilford County, and shifting a large block of Democrats into District 12 and out of District 6 (which was occupied by a Republican). To conclude from the e-mail that race predominated over these other goals in the drawing of the District 12 lines, one has to pile inference on top of inference: first, that Cohen is not just describing the voters moved into District 12, but also identifying his understanding of the reason they were moved; then, that the overall General Assembly had the same reason in mind when it enacted the statute; and even then, that the race-related reason was not just one of the General Assembly's motives, but the Assembly's *predominant* motive. Even assuming the e-mail suggests something about the motives of some of the participants in the redistricting process, it is a wildly distant cry from the official State concessions of racial motive on

which this Court was able to base inferences of predominant legislative motive in other *Shaw* cases. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) ("stray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria").

2. Senator Cooper's observation (prior to this Court's decision in *Lawyer*) that because District 12 is not majority-minority, "it is my opinion and the opinion of many lawyers that the test outlined in *Shaw v. Hunt*, will not even be triggered because it is not a majority-minority district," J.A. 475, provides even less support for an inference that race predominated the drawing of the district lines. According to appellees, "[i]f there were no racial motive driving the formation of the Twelfth District, there would be no need to be concerned about 'triggering the test of *Shaw*.'" *Id.* at 39. Appellees are quite wrong: the entire point of Cooper's statement was to promote passage of the plan to senators who were concerned that, among other things, the plan might provoke yet another costly constitutional challenge from counsel for appellees. And there is not even a whisper of record evidence that anybody involved in drafting the plan believed there to be a "target" of crafting a district with just under 50% minority population. *See* J.A. 195, 211-12, 220-21, 228-29, 236-38, 602, 621, 645-47.[11]

[11] The statements of Representative McMahan discussed in Appellees Br. at 38-39 were, yet again, not relied upon by the district court. If anything, however, they only confirm that race was the motive that was readily compromised in the design of District 12 in favor of incumbency considerations. *See Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (race is predominant when, in the presence of other motives, it is the one criterion that "could not be compromised"). In the very passages appellees cite, J.A. 455, 471, Representative McMahan is anticipating and responding to questions from members who might be *objecting* to the Plan on the ground District 12 does not have *enough* African-American residents. Representative McMahan tries to assuage such concerns by agreeing that

3. Finally, whatever Senator Cooper actually meant by his rather obscure statement on the floor that the 1997 plan "provides for fair geographical, racial and partisan balance throughout the State of North Carolina," J.A. 221, at the very most the statement establishes that he and the others considered *each* of those factors.[12] That provides no basis whatsoever for an inference that race predominated over the other factors, *see* State Br. at 38, and appellees do not even attempt to suggest any such basis. Instead they point to statements by *other* individual legislators referring to the racial balance of the plan (without further explanation), Appellees' Br. at 40, statements on which – once again – the district court did not rely.[13]

if the "incumbency [protection] elements" of the plan are put to one side, the plan is still "racially fair" even though it is not majority-minority because a minority "will have a fair chance of being elected." J.A. 471. The point being made is that while the district is less "racially fair" than it would have been had the State been predominately motivated by race, it is not *unfair* to minority voters and candidates. In the colloquy McMahan is also careful to caution his questioner that race "can only be a factor – along with other factors – and that's what we've tried to do." J.A. 470-71.

[12] Appellees assert that the district court "found that Appellents' *key witnesses* were 'not credible' and 'not reliable,'" and that these findings "suffice[] . . . to support the inference in this case that *the Appellants* had a predominant racial motive they were trying to conceal." Appellees' Br. at 11 n.12 (emphasis added) (citing *Reeves*, 120 S. Ct. at 2108). But the district court did not find that the State's "key witnesses" or "the Appellants" were not credible; it rejected only the testimony of Senator Cooper. And the only evident basis for rejecting his testimony was the court's conclusion that it could not be reconciled with the statistical evidence, a conclusion that, as we have seen, is insupportable.

[13] Appellees also rely on the testimony of several individual legislators, who testified at trial as to their view that the race predominately motivated the General Assembly's enactment of the 1997 plan. Appellees' Br. at 45-47. But none of these legislators was involved in any way in the drafting process, and such evidence was incompetent testimony as

IV. APPELLEES' CHALLENGE TO DISTRICT 12 IS BARRED BY ESTABLISHED PRINCIPLES OF CLAIM PRECLUSION

Appellees contend that none of the three elements of claim preclusion exist here. *See* Appellees' Br. at 53-54. Appellees are wrong at every turn.

1. The judgment of the *Shaw* court is indisputably a final judgment on the merits for preclusion purposes. The relevant question is whether that judgment encompassed the "same claim" as this subsequent suit.

2. The answer to that question is yes, because the current action raises "issues that were or could have been raised" in the prior proceeding. *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981). The *Shaw* plaintiffs had the opportunity to raise any argument that the 1997 Plan failed to "cure the constitutional defects in the former plan" with respect to District 12. *Shaw v. Hunt*, CA No. 92-202-CIV-5-BR, Order (E.D.N.C. June 9, 1997). This action involves exactly that issue – *viz.*, whether District 12 in the 1997 Plan remains unconstitutional – and so necessarily implicates the "same claim" for preclusion purposes. If it does not, plaintiffs in any redistricting challenge could stand silent when specifically given an opportunity to raise constitutional objections to a new districting plan remedy, and then promptly file suit in a subsequent action alleging that the revised plan is unconstitutional. That is precisely the sort of outcome claim preclusion principles are intended to prevent.[14]

3. Finally, appellees submit that preclusion requires identity of the parties. This Court, however, has repeatedly acknowledged that claim preclusion applies not only to the same parties but extends to their "privies." *See, e.g., Moitie*, 452 U.S. at 398. The question here, then, is whether the two sets of plaintiffs are in privity. As we explained in detail in our opening brief, counsel's representation of both sets of plaintiffs, the concomitant coordinated and tactical maneuvering and forum-shopping, the closely aligned interests and overlapping participation of the plaintiffs in the two cases, and the "fence-sitting" implications of a public law issue of the sort implicated by this action, all combine to establish privity here. *See* State Br. at 48-49. Otherwise, a party could essentially game the system by lining up one plaintiff after another to raise successive challenges to any govern-

---

to the state of mind of those who were; it is likely for these reasons that the district court disregarded such testimony in making its findings.

Similarly, appellees press on appeal their inevitable argument that District 12 is unconstitutional because it is "tainted" by the previous unconstitutional District 12 in the 1992 Plan. Appellees' Br. at 41-45. Even putting the significant differences in appearance between the two districts to one side, the dispositive point is that the district court in this case explicitly rejected appellees' argument, holding that "[a] comparison of the 1992 District 12 and the present District is of limited value here." J.S. 24a. Appellees also raised this same argument in the earlier summary judgment appeal before this Court, but the Court's opinion in that appeal did not even mention any "taint" remaining from the earlier District 12 as relevant evidence on appellees' side of the question.

[14] Appellees argue that the two proceedings cannot involve the same claim because the *Shaw* plaintiffs lacked Article III standing to file a separate lawsuit challenging the revised District 12 as a racial gerrymander. *See* Appellees' Br. at 54. But the *Shaw* plaintiffs *did* have standing to address the remedial adequacy of the 1997 Plan in the *Shaw* litigation itself, including whether the 1997 Plan eliminated District 12's unconstitutional aspects. *See* J.S. 319a (any "lack of standing on their part to challenge the constitutionality of that particular configuration of districts cannot affect our retained jurisdiction to review the plan for its adequacy to remedy the violation found as to former District 12"). In addition, even if the first court erred as to its subject-matter jurisdiction over plaintiffs' objections – and further assuming that plaintiffs only had standing to make such objections to the extent they would have had standing to file a separate complaint – such an error does not undermine the preclusive effect of its judgment. *See* 18 James W. Moore et al., Moore's Federal Practice ¶ 131.21[3][a], at 131-44 to 131-45 (3d ed. 1997); 18 C. Wright et al., Federal Practice and Procedure § 4428, at 272 (1981).

mental action in different courts until one challenge finally succeeded in obtaining the desired injunctive relief.

* * * *

This case presents itself on the eve of the next round of electoral redistricting by the States. If the district court's finding of racial predominance is affirmed on the facts in this record, States will be loathe to draw partisan districts where race and voting behavior correspond. They will understandably fear that the boundary correlation with partisan voting may turn out to be insufficiently "precise" to ward off costly federal-court litigation. Reversal of the judgment below, on the other hand, would not undermine the limits *Shaw* imposes on redistricting behavior. Cases like *Miller*, *Bush*, and *Hunt* have established clear and effective guideposts for evaluating *Shaw* challenges. Where, for example, a State repeatedly (and inexplicably) includes precincts that have numerous minority voters but that also make the district less partisan (as the State did in *Bush*, 517 U.S. at 971), or where a State repeatedly (and inexplicably) excludes non-minority precincts that are more partisan than precincts included, or where the direct evidence clearly demonstrates that the State Legislature enacted the redistricting statute with lines drawn for predominantly racial reasons, a challenge will succeed. No such showings have been made in this case.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the judgment should be reversed.

Respectfully submitted,

MICHAEL F. EASLEY
North Carolina Attorney General

Tiare B. Smiley*
Special Deputy Attorney General

Norma S. Harrell
Special Deputy Attorney General

Walter E. Dellinger
O'Melveny & Myers LLP

Brian D. Boyle
O'Melveny & Myers LLP

Sri Srinivasan
O'Melveny & Myers LLP

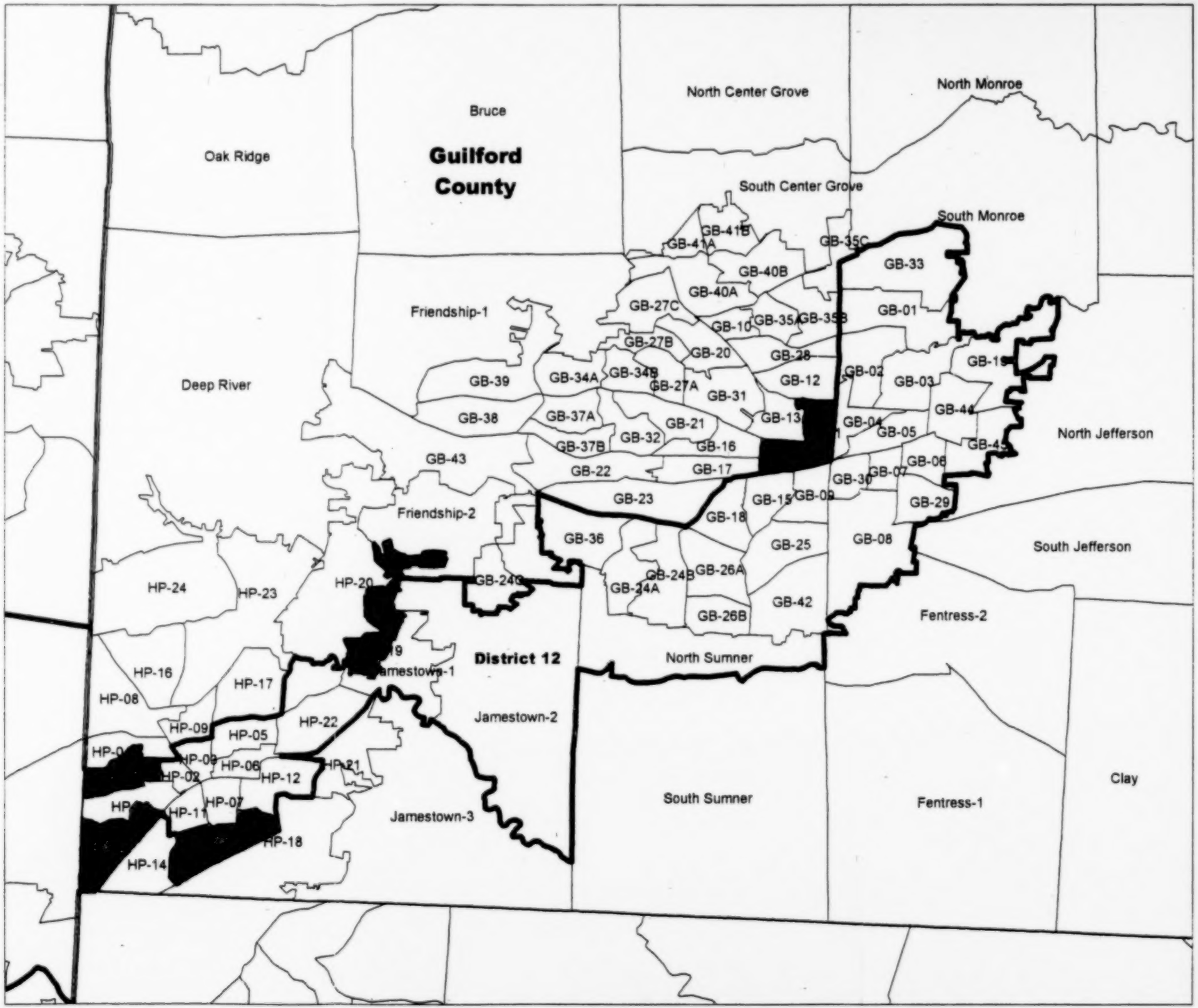
Jonathan D. Hacker
O'Melveny & Myers LLP

November 8, 2000

* Counsel of Record

FOOTNOTE 25 ALTERNATE GUILFORD COUNTY PRECINCTS LEGEND

- County Lines
- Precinct Lines
- District Line
- Precincts moved into District 12
- Precincts moved out of District 12



Supreme Court, U.S.
FILED
NOV 8 2000
CLERK

(19)

No. 99-1865

IN THE

Supreme Court of the United States

ALFRED SMALLWOOD, *et al.*,

Appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

REPLY BRIEF OF THE SMALLWOOD APPELLANTS

ELAINE R. JONES
DIRECTOR-COUNSEL

NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street
Suite 1600
New York, NY 10013
(212) 965-2200

TODD A. COX*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 Eye Street, N.W.
10th Floor
Washington, D.C. 20005
(202) 682-1300

ADAM STEIN
Ferguson, Stein, Wallas, Adkins,
Gresham & Sumter, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

**Counsel of Record*

Attorneys for Smallwood Appellants

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

25pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Argument 1

I. There is Insufficient Evidence to Support the Decision Below 1

II. Appellees Urge that this Court Adopt Legal Standards that are Discriminatory and Untenable 8

III. On the Record Before It, the Court Below Should Have Determined Whether the 1997 Plan Could Be Justified Under Strict Scrutiny 18

Conclusion 20

TABLE OF AUTHORITIES

CASES

Page

Abrams v. Johnson, 521 U.S. 74 (1997) ..... *passim*

Burns v. Richardson, 384 U.S. 73 (1966) 10

Bush v. Vera, 517 U.S. 952 (1996) 16, 17

Davis v. Bandemer, 478 U.S. 109 (1986) 14

Growe v. Emison, 507 U.S. 25 (1993) 10

Hunt v. Cromartie, 526 U.S. 541 (1996) ..... *passim*

Johnson v. DeGrandy, 512 U.S. 997 (1994) 14

Lawyer v. Department of Justice,
521 U.S. 567 (1997) 7, 12, 17

Miller v. Johnson, 515 U.S. 900 (1995) ..... *passim*

Scott v. United States, 920 F. Supp. 1248 (M.D. Fla. 1996),
aff'd sub nom. Lawyer v. Department of Justice,
521 U.S. 567 (1997) 7, 12, 17

Shaw v. Hunt, 517 U.S. 899 (1996) 10, 17

Shaw v. Reno, 509 U.S. 630 (1993) 12, 17

Thornburg v. Gingles, 478 U.S. 30 (1986) 3, 19

United States v. Hays, 515 U.S. 737 (1995) 16

Village of Arlington Heights v. Metropolitan
Development Corp., 429 U.S. 252 (1977) 15

Voinovich v. Quilter, 507 U.S. 146 (1993) 9, 10

Page

White v. Weiser, 412 U.S. 783 (1973) 9

Wise v. Lipscomb, 437 U.S. 535 (1978) 10

STATUTES

42 U.S.C. § 1973 14

REPLY BRIEF OF SMALLWOOD APPELLANTS

ARGUMENT

I. There is Insufficient Evidence to Support the Decision Below

A careful reading of the Appellees' Brief on the Merits ("Br."), and of the portions of the record that are cited therein, demonstrates the absence of evidence sufficient to support the judgment entered in Appellees' favor by the majority of the court below. Instead, the only conclusion supportable on this record is that Appellees utterly failed at trial to meet their burden of proving that race was the *predominant* factor driving the North Carolina Legislature's creation of the 1997 Remedial Plan.

In this Court, as below, Appellees dismiss the State's direct proof of the Legislature's overriding political concerns and ascribe predominantly racial motivations to the members of the General Assembly based on inferences they would have the Court draw from circumstantial evidence[1] — primarily a

---

[1]Appellees introduced what they describe as a "smoking gun": an e-mail from Gerry Cohen (who was on the staff of the General Assembly and prepared computerized versions of districting alternatives for the legislators). The e-mail referred to an alternative resulting from shifting groups of voters into the Twelfth District, which included, in Cohen's words, the transfer of the "Greensboro black community." Not only, as we discussed in our opening brief, does this "evidence" fail to establish the *predominance* of legislative racial motivation, *see* North Carolina Jurisdictional Statement Appendix ("NC. J.S. App.") at 48a (Thornburg, J., dissenting), but in fact it was not shown to be the view or expression of anyone other than Mr. Cohen. Joint Appendix ("Jt. App.") at 216 (Senator Cooper, one of the two addressees of the e-mail, did not remember it). Appellees offer no basis for imputing the contents of the e-mail to the North Carolina House and Senate. Their assertion that the "E-mail reveals [that], behind the scenes the principal authors of the plan had a single-minded

tortured recitation of the shape and demographic characteristics of District 12 in the 1997 Remedial Plan, *see*, *e.g.*, Br. at 14-23 — which they argue should be assessed in a vacuum, divorced from any consideration of political context.[2] But the evidence they cite will not bear the weight they seek to place upon it.

Appellees attempt to bolster their case by developing, *post hoc*, a variety of "facts" and "arguments" neither presented to nor relied upon by the lower court, and which do not survive careful scrutiny. For example, Appellees claim that "an explanation that [District 12] was constructed for a Democrat of any race to win is *probably* inaccurate if the district is 'safer' than necessary for any Democrat to win," Br. at 26 (emphasis

---

obsession with the racial composition of the First and Twelfth Districts, rather than the political," Br. at 35, is an extravagant over-reading of the evidence. The majority below clearly erred in determining, based solely on the e-mail, that "the chief architects of the 1997 Plan had evolved a methodology for segregating voters by race, and [] they applied this method to the 12th District," NC. J.S. App. At 27a. Rather, the evidence at trial demonstrated that the 1997 Remedial Plan was a compromise between two political parties, each of which controlled one of the two chambers of the North Carolina General Assembly.

[2]Thus, for example, Appellees continue to complain that the 1997 Remedial Plan divided Mecklenburg County, North Carolina's largest. Br. at 24 n.22. They ignore the fact that placing the entire county in a single congressional district would pit two incumbents (one Republican, one Democratic) against one another. Avoiding contests between incumbents is a traditional districting criterion that, in addition, had great partisan political significance in a State whose delegation was evenly split between the major political parties. Appellees' concern is all the more disingenuous, since their own expert proposed moving Democratic precincts currently in District 12 in Mecklenburg County into District 8, a transfer which would have resulted in a three-way county split. *See* Trial Transcript, November 30, 1999 at 312.

added),[3] and they assert for the first time in this litigation that "[t]he Twelfth District is gerrymandered so that African-Americans make up about 60% of the persons eligible to vote in a Democratic *primary*." *Id.* (emphasis added). To support this contention, Appellees cite the testimony of their expert, Dr. Weber, that "'[B]lack voters have the ability to control the Democratic nomination' and can then 'count on some crossover voting in the general election to win.'" *Id.*[4] But Dr. Weber did not claim that District 12 was gerrymandered to affect primary election results; rather, he asserted that District 12 was an "overly safe" district in general elections.

Dr. Weber's opinion was based upon a primary election analysis different from the intricate calculations set forth in Appellees' Brief, which are based on estimated registration rates by race in "urban areas" of North Carolina, Br. at 27 n.24, were never presented to the trial court, and were not tested on cross-examination. Dr. Weber opined, on the basis of a flawed analysis, *see infra* p. 4, that more African American than white Democrats would participate in primary elections in the Twelfth District and could therefore determine the nominee. In their

---

[3]Ultimately, Appellees are equivocal about what even their own theories prove, asserting that their analysis "may explain" the motivation of the General Assembly and shows that the State's explanations for District 12's shape are "probably" inaccurate. *See* Br. at 26 and 28.

[4]As noted, Appellees assert that African American voters in District 12 can "'count on some crossover voting in the general election to win.'" Wisely, they do not press this point, since the low levels of crossover voting received by the African American candidates of choice in District 12 are comparable to the levels found in the districts in which this Court found vote dilution in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *See* Trial Transcript, November 30, 1999 at 318-320.

Brief, Appellees argue (without any record support whatsoever) that the Twelfth District was gerrymandered to have a Black "super-majority" in Democratic primary elections sufficient to overcome "single-shot" voting in favor of white candidates. This Court should not affirm the decision below based upon newly invented theories unsupported by the record, and never discussed by the lower court.

Moreover, Dr. Weber's conclusion that African American voters could "control the Democratic nomination" was based upon a methodologically flawed analysis of the primary election participation rates of white and African American voters. Dr. Weber asserts that white voters vote at lower rates in the North Carolina primary elections he analyzed. However, in North Carolina, only Democrats and unaffiliated voters may participate in the Democratic primary; Republicans are ineligible to participate. Trial Transcript, November 30, 1999 at 312-313. Since Dr. Weber's registration data did not include information about the voters' party affiliation, he was unable to separate registered voters by party. *See id.* at 313-314. The participation percentages he calculated for white voters in Democratic primary elections were based upon *all* white registered voters, including those who might be Republican and, therefore, ineligible to vote in the Democratic primary. *See id.* As a result, Dr. Weber's analysis artificially deflates the participation of white voters in the Democratic primary, since some proportion of those voters would not be eligible to participate in the Democratic primary in any event. *See id.* at 314.

Dr. Weber admitted that his analysis understated white voters' participation in the Twelfth Congressional District primary elections, testifying: "If we could, in fact, separate out

the white Republican voters from the white Democratic voters, each of the participation estimates would be higher for the white participation rate." Trial Transcript, November 30, 1999 at 314. He admitted that this is particularly true for District 12. *See id.* Therefore, Appellees' argument below, that white voters participate at lower rates than African American voters in District 12 and therefore control the primary process, was not substantiated in the record. That contention, in turn was the predicate for Dr. Weber's conclusion that District 12 is an "overly safe" Democratic district in general elections, which also fails.[5]

The majority below did not rely on nor make any findings concerning the issue of whether the Twelfth District is "too safe" and did not adopt Appellees' claims as a basis for its ultimate legal conclusions. Appellees have merely devised, *post hoc*, new formulas and analyses by piecing together "facts" that the court below never had before it, Br. at 26-28; Br. at 30 n.25, and unfairly criticize the North Carolina General Assembly for failing to adopt modifications of the boundaries for the Twelfth District that, so far as the record reflects, were never presented to the legislature. It simply defies logic to infer unconstitutional intent from the rejection of alternatives that the General Assembly *never had the option to select*.

---

[5]Many of the representations about the record evidence contained in Appellees' Brief could be similarly dissected and the arguments they ostensibly support similarly discredited. However, in the interest of economy and in an effort to avoid duplicating information set forth in our opening brief and material presented by the State Appellants in their reply brief, the Smallwood Appellants have limited their recitation of the factual inadequacies of Appellees' presentation of the record below.

Moreover, Appellees offer their "alternatives" in a vacuum and in piecemeal fashion, giving isolated examples of "swaps" of voters they suggest would have been feasible and arguing that "[b]y reworking other districts, and by using a computer instead of identifying these precincts by hand . . . this list could no doubt be expanded." Br. at 30 n.25. In reality, a complete plan encompassing an entire congressional district must be developed and analyzed to determine the political and legal consequences of implementing it. Appellees themselves concede that their particular redistricting choices, reflected in one of their partial alternatives, could be non-compact, *see id.*, and their own expert admitted that his analyses did not account for the actual constraints, including various political and redistricting realities, that confronted the North Carolina General Assembly. *See* Trial Transcript, November 30, 1999 at 271-273, 278-279. Indeed, Dr. Weber displayed some contempt for the realities of the redistricting process and those legislators who must engage in it. *See, e.g., id.* at 281 (concluding that he does not trust legislators to conduct redistricting).

It would be a substantial breach of the federalism and comity principles established by this Court to dismantle a redistricting plan, forged in the politically charged atmosphere in which the 1997 Remedial Plan was developed, based simply upon Appellees' selective and untested precinct-by-precinct critique. *See infra* p. 9. As Justice Stevens said in concurrence in *Hunt v. Cromartie*, 526 U.S. 541 (1999):

> [B]izarre configuration is the traditional hallmark of the political gerrymander. . . . [T]he shape of the congressional district at issue in this case provides strong evidence that either political or racial factors

> motivated its architects, but sheds no light on the question of which set of factors was more responsible for subordinating any of the State's 'traditional' districting principles.

Hunt, 526 U.S. at 555 (citations and footnote omitted).[6]

---

[6]Appellees cite the statements of two legislators in an effort to establish that the General Assembly conspired to draw the District 12 lines so as to ensure that its African American population was as high as possible without exceeding 50%. Br. at 37 n.31 and 38. The comments of Senator Cooper and Representative McMahan, on which Appellees and the majority below relied, were intended to assure legislators that (in their opinion) the plan drawn by the districting committee based on partisan political considerations would not be vulnerable to constitutional challenge. Neither of the floor leaders purported to be describing the process or criteria by which the plan was created.

Moreover, their comments are consistent with this Court's *Shaw* jurisprudence. As discussed in the Smallwood Appellants' opening brief, the fact that District 12 is not majority-black is relevant to a federal court's determination whether race was a predominant factor in its creation. *See Lawyer v. Department of Justice*, 521 U.S. 567, ___ , 117 S. Ct. 2186, 2195 (1997), *aff'g Scott v. United States*, 920 F. Supp. 1248 (M.D. Fla. 1996) ("[t]he fact that District 21 under Plan 386 is not a majority black district, the black voting-age population being 36.2%, supports the District Court's finding that the district is not a 'safe' one for black-preferred candidates, but one that 'offers to any candidate, without regard to race, the opportunity' to seek and be elected to office" [citation omitted]). *Lawyer*'s vitality does not depend upon the proposition that "the Equal Protection Clause does not apply to districts with less than 50% minority population," and Appellees mischaracterize the views of this Court, as well as the arguments of the Smallwood and State Appellants by suggesting otherwise. *See* Br. at 36 n.30.

II. Appellees Urge that this Court Adopt Legal Standards that are Discriminatory and Untenable

Appellees' arguments in support of affirmance would require this Court to announce new legal standards governing redistricting that are unworkable or that would apply only to minority candidates in a discriminatory fashion. These new standards would amount to adoption of a rule that the Court explicitly declined to announce in *Miller v. Johnson*, 515 U.S. 900 (1995): that if race was at all a factor in the creation or design of a redistricting plan — although not the *predominant* factor — the plan is *per se* illegal.[7] Appellees' arguments are inconsistent with the concern for State interests that underlies the standard of review developed in this Court's *Shaw* jurisprudence and also conflict with the Court's long-standing precedents in the apportionment context. Moreover, Appellees' contentions serve only to highlight the lower court's error in disregarding this Court's precedents when it invalidated the 1997 Remedial Plan.

First, Appellees equate preservation of some "core" portions of District 12 in prior districting plans with an invidious racial intent to discriminate in the redistricting process. *See, e.g.*, Trial Transcript, December 1, 1999 at 557 and 602; Final Pretrial Order at 10; NC. J.S. App. at 44a; Appellees' Brief on the Merits at 11 n.11 (comparing the 1992 Plan with the 1997 Remedial Plan "would seem quite relevant for the purpose of

---

[7] *See, e.g.*, 515 U.S. at 916 (legislatures are "almost always . . . aware of racial demographics but it does not follow that race predominates"); *id.* (other districting principles must be *subordinated* to race) (opinion of the Court); *id.* at 928 (O'Connor, J., concurring); *id.* at 935 (Ginsburg, J., dissenting).

determining whether the unconstitutional taint of the 1992 version of the Twelfth District had been removed"). But this Court has never held, in either "one person, one vote" or in *Shaw* cases, that States are required to discard completely a prior invalidated plan in the process of devising a remedial plan.[8] Such a rule would be inconsistent with the great deference that this Court has accorded to the States' policy choices in the redistricting process, which the Court has repeatedly said should be set aside by a federal court only to the extent necessary to remedy a violation of federal law. *See, e.g., White v. Weiser*, 412 U.S. 783, 795 (1973) (in devising a remedy for a federal constitutional violation, a court "should follow the policies and preferences of the State, expressed in statutory and constitutional provisions or in reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitutions"); *see also Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("[F]ederal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements").

A State legislature's redistricting options should not be constrained simply because the litigants who secured invalidation of a prior plan would prefer a particular outcome;

---

[8] As Judge Thornburg, dissenting below, recognized, preservation of the cores of preexisting districts is closely connected to another traditional districting principle, incumbency protection. *See* NC. J.S. App. at 44a-45a ("requiring a legislature to start completely from scratch makes their task nearly impossible because congressional incumbents and state legislators will invariably demand the preservation of as much of the geographic core of districts as possible, a political reality explained in testimony at the trial."). *See* discussion *infra* at 11-15.

rather, the State's preferences may be disregarded only to the extent necessary to ensure a remedy for the original violation. Where, as in this case, the State has enacted a new plan that fully remedies the *Shaw* violation and complies with all applicable federal and state constitutional and statutory provisions, there is no basis for federal judicial interference with its implementation. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *see also Shaw v. Hunt*, 517 U.S. 899, 917 n.9 (1996) ("states retain broad discretion in drawing districts to comply with the mandate of § 2") (citing *Voinovich v. Quilter*, 507 U.S. 146 (1993) and *Growe v. Emison*, 507 U.S. 25 (1993)); *Burns v. Richardson*, 384 U.S. 73, 85 (1966) ("A State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause").

Appellees cite *Abrams v. Johnson*, 521 U.S. 74 (1997) in support of their contention that it was unconstitutional for the legislature to have sought to maintain the cores of Districts 1 and 12 in creating the 1997 Remedial Plan. *Abrams* in fact supports the legality of North Carolina's 1997 Remedial Plan. In *Abrams*, the lower court was criticized for fashioning a plan that included only one, rather than two, majority-African American districts on the ground that the plan enacted by the Georgia Legislature prior to that invalidated in *Miller v. Johnson* had included two such districts and represented the State's policy preference. The trial court in *Abrams* had rejected alternatives suggested by the parties that created a second majority-minority district because, it held, that would have required it to disregard and subordinate traditional redistricting criteria. This Court agreed, reasoning that "the State was subjected to steady Justice Department pressure to

create the maximum number of majority-black districts, and there is considerable evidence the State was predominantly driven by this consideration even in developing its 1991 [two majority-minority district] plan." *Abrams v. Johnson*, 521 U.S. 74, 86 (1997).

In this case, unlike *Abrams*, the North Carolina General Assembly in 1997 not only acted without Justice Department pressure but also rejected a plan that would have created a majority-African American District 12 by extending District 12's boundaries to Durham. *See* Brief of Smallwood Appellants at 10. The 1997 Remedial Plan reduces the number of majority-African American districts in North Carolina from two to one, and it substantially redrew the boundaries of District 12 to eliminate extensions or extremities. These facts closely resemble the manner in which the Georgia plan upheld by this Court in *Abrams* was fashioned. *See, e.g.*, Brief of Smallwood Appellants at 11-12, 23-24.[9] Reversal of the judgment below would therefore be consistent with, not contrary to, the decision in *Abrams*.

Second, Appellees urge that the return to office of an incumbent elected from an invalidated district establishes conclusively that the new districting plan is inadequate to

---

[9]A further basis for distinguishing *Abrams* is that the Georgia legislature in that case had been unable to enact a plan to remedy the constitutional violation found by the Court in *Miller v. Johnson*. Here, however, the North Carolina General Assembly *did* act to cure the violations found by this Court in a manner consistent with its policy preferences. Under these circumstances, it is entitled to a presumption of good faith in its execution of the redistricting process and to appropriate deference from the federal courts — which, as discussed earlier, the majority below failed to give.

remedy the constitutional violation — but they would apply this rule only to minority incumbents who had been elected under an invalidated plan. This Court has never announced such a standard, which if given effect in all Fourteenth Amendment cases would undermine even the most routine redistricting processes; and it has never characterized the principle of *Shaw v. Reno*, 509 U.S. 630 (1993) as applying only to majority-minority districts. *See* 509 U.S. at 650-51 (equal protection analysis "not dependent on the race of those burdened or benefitted" [citations omitted]).

In this case, it is undisputed that the State sought to protect *all* incumbent members of its congressional delegation, Democratic and Republican, white *and* African American, *see, e.g.*, Jt. App. at 180-182, 211, 241; and that "every one of the majority African-American precincts included in the Twelfth District are among the highest, if not the highest, Democratic performing districts in that geographic region," Jt. App. at 50a. These facts show no more than that the legislature acted in accordance with the "political reality" in North Carolina. *See* NC. J.S. App. 44a-45a (Thornburg, J., dissenting).

Appellees argue that the 1997 Plan is not justified by incumbency protection because it is not limited to "just avoid[ing] pairing incumbents." Br. at 28. They seek on this basis to distinguish *Lawyer v. Department of Justice*, 521 U.S. 567 (1997) from the facts in this case. Br. at 17 n.16 and 29. *See also* Br. at 36 n.30. But this Court has never constricted a legislature's ability to protect incumbents in this manner. Neither this Court in *Lawyer*, nor the lower court judgment in *Scott v. United States Department of Justice*, 920 F. Supp. 1248 (1996) that it affirmed, regarded protection of the interest of an incumbent in being re-elected in a district redrawn

following a *Shaw* challenge as an indicium of a continued constitutional violation.[10] Moreover, in each of the cases in which this Court has upheld districts redrawn after prior Constitutional invalidation of redistricting plans under the *Shaw* regime, the incumbents have been re-elected, including the districts considered in *Abrams*.

While Appellees seek to apply their rule only in the context of findings of unconstitutionality in cases brought pursuant to the cause of action recognized in *Shaw*, there is no principled reason why this rule would apply only in that context, rather than in all cases of Fourteenth Amendment violations — including "one person, one vote" suits. Since both types of lawsuits are commonplace following decennial redistricting, Appellees' proposed rule of decision would expose jurisdictions to a never-ending series of challenges to the constitutionality of any plan adopted during the post-2000 Census redistricting that succeeded in protecting an incumbent whose district had been previously found to violate the Fourteenth Amendment. This is perhaps why this Court has never adopted an absolute rule that, after an electoral district is found by a court to be unconstitutional, an incumbent is not entitled to the same level of incumbency protection as his or her counterparts when the district is redrawn.

Appellees' protests over the fact that District 12 voters have reelected Mel Watt amount to little more than a complaint that Appellees' own political preferences were not realized in

---

[10]In *Lawyer*, Florida House District 21's incumbent, Representative James T. Hargrett, Jr., intervened in the case to protect his interest in being able to run for office in a district that was favorable to his electoral success.

the redistricting process. However, neither the United States Constitution nor Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, guarantee particular electoral outcomes. Even where vote dilution has been found, the remedy is limited to establishing a non-dilutive plan, not to proportional representation or some specific electoral result. *See Johnson v. DeGrandy*, 512 U.S. 997, 1014 n.11 (1994) ("the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race"). *See also Davis v. Bandemer*, 478 U.S. 109, 129-30 (1986) (plurality opinion) (lack of proportional representation does not establish unconstitutional political gerrymander); *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971) ("[We] are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them").

Just as the lack of electoral success is not sufficient to establish unconstitutional vote dilution or a political gerrymander, reelection of an incumbent under a revised districting plan cannot alone establish the inadequacy of a remedial plan adopted after a *Shaw* violation. As the Court recognized when this case was last before it, "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact." *Hunt v. Cromartie*, 526 U.S. at 551 (citations and footnote omitted).[11]

---

[11]Appellees misrepresent the record when they suggest that evidence of racial predominance was presented at trial below in the form of testimony that Representative Watt's campaign "defined [potential voters for Watt] on the basis of race" and "targeted [these] African-American voters through direct mail, African-American newspapers, and radio stations chosen because of their predominantly African-American audience." Br. at 46, citing Jt. App. at 578-83. In fact, Representative Watt's District Director, Don Baker, testified as follows:

> Q Was there a difference in the targeted voters with respect to the African American candidate?
> A Not really; interestingly enough, not really. We have worked for many affiliated organizations. We have worked for women, senior citizens, African Americans, the Hispanic community. In the campaigns that I have been involved with that is kind of the target groups that we were working towards, keeping them involved.

Jt. App. 581.

> A. . . . We did polling to see exactly what the issues were that was on people's minds. We in turn developed mail towards target groups. Seniors was one of the target groups that we sent direct mail to. Women was a targeted direct mail. African Americans was a targeted direct mail. And we sent smaller mailers to other individual groups, organizations.

Jt. App. 582. Thus, the record testimony cited by Appellees demonstrates that Rep. Watt's campaign identified and sought the support of diverse groups of voters. Appellees, however, ask this Court to single out African American voters for electoral exclusion and to limit African American voters' full enjoyment of their right to be actors in the political process.

Third, citing *Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252 (1977), Appellees contend that this Court should modify the standard announced in *Shaw*, *Miller*, and related cases by requiring that "racial motive need not be shown to be the predominant motive but

only a cause" and also propose shifting the burden of proof from plaintiffs to defendants by requiring that "the State [] bear the burden of proving that the 'taint' of a racial gerrymander has been removed." Br. at 56 n. 43. This reflects another attempt by Appellees to distract the Court from their failure to satisfy their burden of proof in this case.

As discussed in the Smallwood Appellants' opening brief, in cases such as this one, this Court has held that Appellees have the heavy evidentiary burden of proving that "'race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines,'" *Bush v. Vera*, 517 U.S. 952, 958 (1996) (*quoting Miller*, 515 U.S. at 913), and "that other, legitimate districting principles were 'subordinated' to race." *Bush*, 517 U.S. at 958 (*quoting Miller*, 515 U.S. at 916). *See generally id.* at 259-68. Specifically, as this Court has recognized, Appellees here must "prove that District 12 was drawn with an impermissible racial motive . . . [and] strict scrutiny [only] applies if race was the 'predominant factor' motivating the legislature's districting decision." *Hunt v. Cromartie*, 526 U.S. at 547. Merely showing that the State of North Carolina conducted the redistricting process with some "consciousness of race" is not sufficient. *See Bush*, 517 U.S. at 1051. Rather, this Court has acknowledged the reality that a state "'always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors" but held that "[this] sort of race consciousness does not lead inevitably to impermissible race discrimination.'" *United States v. Hays*, 515 U.S. 737, 745 (1995) (citation omitted) (emphasis in original). *See also Bush*, 517 U.S. at 993 (O'Connor, J., concurring). This is an important recognition because it avoids undue interference with

the State's development of plans that legitimately recognize myriad political and demographic considerations.

Moreover, in this very case, this Court has defined the proper role race may play when a state attempts to satisfy its various political objectives during the redistricting process, by holding that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. at 542 (emphasis in the original) (citing *Bush*, 517 U.S. at 968; *Shaw v. Hunt*, 517 U.S. at 905; *Miller*, 515 U.S. at 916; *Shaw v. Reno*, 509 U.S. at 646). *See also* Brief of the Smallwood Appellants at 21-22.

This Court's recognition that legislatures are always aware of race in drawing district lines, and its consequent holding that legislatures may permissibly take race into consideration in that process so long as racial considerations do not predominate, carves out a limited role for federal courts in the redistricting process of States that is effective without being overly intrusive. *See Miller v. Johnson*, 515 U.S. at 915-17. The Court has declined to alter that role when a legislative plan adopted to remedy an earlier constitutionally infirm apportionment is at issue. *See Lawyer v. Department of Justice*, 521 U.S. 567 (1997), *aff'g Scott v. United States*, 920 F. Supp. 1248 (M.D. Fla. 1996). While making unsupported accusations that the North Carolina General Assembly deliberately set out to evade the requirements of this Court's ruling in *Shaw v. Hunt*, 517 U.S. 899 (1996), Appellees have presented no convincing reason why this Court should adopt the standard they describe as the "*Arlington Heights* test," which would bar *any* consideration of race by a legislature enacting a remedial

plan and make the scope of federal courts' inquiries into districting processes vastly more intrusive.

III. On the Record Before It, the Court Below Should Have Determined Whether the 1997 Plan Could Be Justified Under Strict Scrutiny

As set forth more fully in the Smallwood Appellants' opening brief, the court below erred in entering judgment in favor of Appellees based on its unsupportable conclusion that race predominated in the 1997 districting process. However, even if this Court were not to question that conclusion, the judgment of the district court cannot stand. Having found that race predominated in the creation of the 1997 Remedial Plan, the lower court should have considered whether a legally sufficient basis existed to justify that action and whether it was sufficiently narrowly tailored to accomplish that interest. *See* Brief of the Smallwood Appellants at 28-31.[12] The lower court

---

[12]Appellees have mischaracterized the discussion of the stipulations in the Brief of the Smallwood Appellants. The Smallwood Appellants never suggested that Appellees stipulated to white bloc voting in the areas encompassed by District 12. Rather, the Smallwood Appellants explicitly stated the truth that Appellees stipulated to a number of facts contained in the record before the North Carolina General Assembly, including two of the three *Gingles* factors, North Carolina's long history of discrimination against African Americans, and that history's lingering effects. *See*, *e.g.*, Brief of Smallwood Appellants at 11 and 30.

In fact, no such stipulation was necessary. Appellees' own expert conceded, both in his deposition and on cross-examination at trial, that racially polarized voting patterns persisted in the elections he analyzed for the case. *See* Deposition of Ronald E. Weber, Ph.D. at 336 (in analysis of white crossover voting, "African American voters are in fact cohesive on which I guess we would call prong 2 in general elections behind Democratic candidates."); Trial Transcript, November 30, 1999 at 320

compounded this error by holding that it need not examine the existence of a compelling justification for the State's action *even if there was one*: "*[E]ven if* such an interest did exist, the 12th District is not narrowly tailored and therefore cannot survive the prescribed 'strict scrutiny.'" *Id.* (emphasis added).

Appellees attempt to counter the Smallwood Appellants' arguments by charging that they constitute an admission that "the district had to be — and was — race-based." Br. at 52. This is an inaccurate distortion of the position of the Smallwood Appellants and further demonstrates Appellees' misapplication of the legal standard in this case.

First, Appellees' contention reflects their view, contrary to this Court's holdings, that a districting plan is unconstitutional simply because race was a factor in its creation. However, in accord with this Court's teachings, the Smallwood Appellants have consistently argued in this case that the 1997 Remedial Plan must be upheld because race was not the *predominant* motive for the creation of the plan. *See supra* p. 8 n.7 and accompanying text. The Smallwood Appellants' presentation of an alternative argument regarding compelling justification is consistent with their theory of the case and the rulings of this Court. It does not, therefore, constitute an admission of any sort.

Second, as discussed in our opening brief, Appellees' and the lower court's dismissive treatment of the strict scrutiny

---

(levels of white crossover vote received by candidates in Districts 1 and 12 from 1990 to 1998 were in a range comparable to the levels of white crossover voting found in the districts in which this Court found vote dilution in *Thornburg v. Gingles*, 478 U.S. 30 (1986)).

analysis finds no support in this Court's rulings and is entirely inadequate to meet the strictures of *Shaw* and its progeny. *See* Brief of the Smallwood Appellants at 29-31. The three tiered analysis demanded by *Shaw*, requires that a Court at least examine what possible legitimate interest a state may have to consider race in the redistricting process. The lower court's failure to do so here, therefore, requires that if this Court disagrees with our submission that race did not predominate in the construction of the 1997 Remedial Plan, it must therefore remand and direct the lower court to make findings concerning the State's interest in enacting such a plan and explain the basis for its decision.

CONCLUSION

For the foregoing reasons, as well as those contained in the Brief of the Smallwood Appellants, this Court should reverse the judgment of the district court and enter judgment for defendants and defendant-intervenors.

Respectfully submitted,

ELAINE R. JONES
Director-Counsel
NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, NY 10013
(212) 965-2200

TODD A. COX*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 Eye Street, NW
10th Floor
Washington, DC 20005
(202) 682-1300

ADAM STEIN
FERGUSON, STEIN, WALLAS,
ADKINS, GRESHAM &
SUMTER, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

**Counsel of Record*

Attorneys for Smallwood Appellants

(4) (3)

Nos. 99-1864 & 99-1865

Supreme Court, U.S.
FILED
SEP - 6 2000
CLERK

In The

Supreme Court of the United States

JAMES B. HUNT, JR.,
Governor of the State of North Carolina, et al.,

Appellants,

v.

MARTIN CROMARTIE, et al.,

Appellees.

ALFRED SMALLWOOD, et al.,

Appellants,

v.

MARTIN CROMARTIE, et al.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of North Carolina

BRIEF AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANTS

LAUGHLIN MCDONALD
Counsel of Record
NEIL BRADLEY
CRISTINA CORREIA
BRYAN SELLS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
2725 Harris Tower
233 Peachtree Street
Atlanta, GA 30303
(404) 523-2721

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

40pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT..... 1

ARGUMENT 3

I. Introduction..... 3

II. The Voting Rights Act and the Importance of Majority-Minority Districts..... 5

III. Challenges to Majority Black and Hispanic Districts 8

IV. The Shaw/Miller Standards Are Unworkable 13

V. Majority White and Majority Nonwhite Districts; Dual Standards 16

VI. Mistaken Assumptions about Segregation..... 22

VII. The Erroneous Comparison with Affirmative Action..... 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Abrams v. Johnson, 521 U.S. 74 (1997) ..... *passim*

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 28

Allen v. Wright, 468 U.S. 737 (1984) 20

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 21

Burton v. Sheheen, 793 F. Supp. 1329 (D.S.C. 1992) 7

Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982)...7, 27

Bush v. Vera, 517 U.S. 952 (1996) 3, 4, 5, 11, 13, 18

Chapman v. Meier, 420 U.S. 1 (1975) 15

City of Memphis v. Greene, 451 U.S. 100 (1981) 22

City of Mobile v. Bolden, 446 U.S. 55 (1980) 21, 27

City of Richmond v. J.A. Croson, Co., 488 U.S. 469 (1989) 28

Connor v. Finch, 431 U.S. 407 (1977) 15

Currie v. Foster, No. 97-CV-368 (W.D.La.) 9

Daly v. High, No. 5:96 CV 86-V (W.D.N.C.) 9

Davis v. Bandemer, 478 U.S. 109 (1986) 8, 27

DeGrandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992) 7

DeWitt v. Wilson, 515 U.S. 1170 (1995) 12

Diaz v. Silver, 932 F. Supp. 462 (E.D.N.Y. 1996)..... 9

Diaz v. Silver, 978 F. Supp. 96 (E.D.N.Y. 1997)..... 12

TABLE OF AUTHORITIES – Continued

Page

Gaffney v. Cummings, 412 U.S. 735 (1973)..... 17

Gomillion v. Lightfoot, 364 U.S. 339 (1960)..... 16

Growe v. Emison, 507 U.S. 25 (1993)..... 15

Hays v. Louisiana, 839 F. Supp. 1188 (W.D.La. 1993).....7, 8

Hays v. Louisiana, 862 F. Supp. 119 (W.D.La. 1994) 26

Hays v. Louisiana, 936 F. Supp. 360 (W.D.La. 1996) 11

Holder v. Hall, 512 U.S. 874 (1994)..... 1

Hunt v. Cromartie, 526 U.S. 541 (1999)..... 3

Johnson v. Miller, 864 F. Supp. 1354 (S.D.Ga. 1994) 7, 9, 19, 25

Johnson v. Miller, 922 F. Supp. 1552 (S.D.Ga. 1995)..15, 24

Johnson v. Miller, 929 F. Supp. 1529 (S.D.Ga. 1996) 9

Johnson v. Mortham, 926 F. Supp. 1460 (N.D.Fla. 1996).....8, 11

Jordan v. Winter, 604 F. Supp. 807 (N.D.Miss. 1984) 7

Katzenbach v. Morgan, 384 U.S. 641 (1966) 25

King v. State Board of Elections, 979 F. Supp. 582 (N.D.Ill. 1996) 9

King v. Illinois Board of Election, 522 U.S. 1087 (1998), *aff'g*, 979 F. Supp. 582 (N.D.Ill. 1996) 12

Kusper v. Pontikes, 414 U.S. 51 (1973) 12

TABLE OF AUTHORITIES – Continued

Page

Lawyer v. Department of Justice, 521 U.S. 567 (1997) 12

Leonard v. Beasley, Civ. No. 3:96-CV-3540 (D.S.C.) 9

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 19

Major v. Treen, 574 F. Supp. 325 (E.D.La. 1983)..... 7

McCain v. Lybrand, 465 U.S. 236 (1984) 1

Miller v. Johnson, 515 U.S. 900 (1995)..... *passim*

Moon v. Meadows, 952 F. Supp. 1141 (E.D.Va. 1997).....9, 11

NAACP v. Button, 371 U.S. 415 (1963) 12

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 21

Quilter v. Voinovich, 912 F. Supp. 1006 (N.D.Oh. 1995)..... 9

Quilter v. Voinovich, 981 F. Supp. 1032 (N.D.Oh. 1997)..... 12

Reno v. Bossier Parish School Board, 520 U.S. 471 (1997) 1

Rice v. Smith, 988 F. Supp. 1437 (M.D.Ala. 1997) 9

Rogers v. Lodge, 458 U.S. 613 (1982)..... 5

Scott v. United States Dept. of Justice, 920 F. Supp. 1248 (M.D.Fla. 1996)..... 9

Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992).....7, 8

Shaw v. Hunt, 517 U.S. 899 (1996) 3, 11

Shaw v. Reno, 509 U.S. 620 (1993) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Smith v. Beasley, 946 F. Supp. 1174 (D.S.C. 1996) 9

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 9, 23, 25

The Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1873) 22

Thomas v. Bush, No. A-95-CA 18655 (W.D.Tex.) 9

Thornburg v. Gingles, 478 U.S. 30 (1986) 5

United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977).....27, 28

United States v. Hays, 515 U.S. 737 (1995)..... 1

United States v. Scott, 437 U.S. 82 (1978)..... 5

United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973)..... 20

Vera v. Richards, 861 F. Supp. 1304 (S.D.Tex. 1994) 7, 8, 17, 18

Washington v. Davis, 426 U.S. 229 (1976)..... 21

Wesch v. Hunt, 785 F. Supp. 1491 (S.D.Ala. 1992) 7

Wygant v. Jackson Board of Ed., 476 U.S. 267 (1986) 28

CONSTITUTIONAL PROVISIONS:

Fourteenth Amendment..... *passim*

Fifteenth Amendment..... 25

STATUTORY PROVISIONS:

Civil Rights Act of 1957 10

TABLE OF AUTHORITIES – Continued

Page

Civil Rights Act of 1960 10

Civil Rights Act of 1964 10

Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq. ...2, 4

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 5

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.....5, 7

CONGRESSIONAL REPORTS:

S.Rep. No. 417, 9th Cong., 2d Sess. 32-3 (1982)..... 25

Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 662 (1982) 24

RULES:

S.Ct. Rule 37.3..... 1

OTHER:

T. Alexander Aleinikoff & Samuel Issacharoff, "Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno*," 92 Mich. L. Rev. 588 (1993) 14

Michael Barone & Grant Ujifusa, The Almanac of American Politics 1974 (1973)..... 7

James U. Blacksher, "Dred Scott's Unwon Freedom: The Redistricting Cases As Badges of Slavery," 39 How. L. J. 633 (1996)..... 29

TABLE OF AUTHORITIES – Continued

Page

David A. Bositis, Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South (Joint Center for Political and Economic Studies, 1995) 8, 23

Congressional Quarterly, Inc., Politics in America 1994: 103rd Congress (Phil Duncan ed., 1993) ..16, 17

Critical Race Theory: The Concept of "Race" in Natural and Social Science (E. Nathaniel Gates ed., 1997) 23

Armand Derfner, "Racial Discrimination and the Right to Vote," 26 Vand. L. Rev. 523 (1973) 9

Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics (1968) 8

Nathan Glazer, "Reflections on Citizenship and Diversity," in Diversity and Citizenship: Rediscovering American Nationhood (Gary J. Jacobsohn & Susan Dunn eds., 1996)..... 23

Bernard Grofman & Lisa Handley, "1990s Issues in Voting Rights," 65 Miss. L. J. 205 (1995) 14

Lisa Handley & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations" in Quiet Revolution in the South (C. Davidson & B. Grofman eds., 1994) 6

A. Leon Higginbotham, Jr., Gregory A. Clarick & Marcella David, "*Shaw v. Reno*: A Mirage of Good Intentions with Devastating Racial Consequences," 62 Ford. L. Rev. 1593 (1994) 10, 14

TABLE OF AUTHORITIES – Continued

Page

Joint Center for Political and Economic Studies, Black Elected Officials: A Statistical Summary (1998) 5

Pamela S. Karlan, "All Over the Map: The Supreme Court's Voting Rights Trilogy," 1993 Sup. Ct. Rev. 245 14

J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Part South, 1880-1910 (1974) 9

J. Morgan Kousser, Colorblind Injustice (1999) 14

Paul Lewinson, Race, Class, and Party: A History of Negro Suffrage and White Politics in the South (1932) 9

Frank R. Parker, Black Votes Count (1987) 10

Frank R. Parker, "The Constitutionality of Racial Redistricting: A Critique of *Shaw v. Reno*," 3 D. Col. L. Rev. 1 (1995) 14, 19, 26

Richard H. Pildes, "The Politics of Race," 108 Harv. L. Rev. 1359 (1995) 6

Quiet Revolution in the South (C. Davidson & B. Grofman eds., 1994) 6, 10

Mark Sherman, "Redrawn Districts Expected To Face Challenge," Atlanta Journal & Constitution, Aug. 2, 1995, p. B6 15

1990 U.S. Census, Population and Housing Profile, Congressional Districts of the 103rd Congress, C.Q. Weekly Report, V. 51, 3473-87 ..... 7, 8

U.S. Commission on Civil Rights, Political Participation (1968) 5

TABLE OF AUTHORITIES – Continued

Page

Bill Wasson, "Wilder Plan Expected to Win Assembly OK," The Richmond News Leader, Dec. 3, 1991, p. 1 7

U.S. Census, Population and Housing Profile, Congressional Districts of the 103rd Congress, *C.Q. Weekly Report*, V. 51, 3473-87.[8]

III. Challenges to Majority Black and Hispanic Districts

The Voting Rights Act was perhaps the victim of its own success. Following the 1992 elections the courts were flooded with challenges by white voters who claimed that the majority black districts were unconstitutional racial gerrymanders.[9] Lawsuits challenging congressional plans were filed in North Carolina (*Shaw v. Barr*, 808 F. Supp. at 465-66), Texas (*Vera v. Richards*, 861 F. Supp. at 1309), Louisiana (*Hays v. Louisiana*, 839 F. Supp. at 1190-91), Florida (*Johnson v. Mortham*, 926 F. Supp. 1460 (N.D.Fla.

[8] There were also substantial increases in the number of majority-minority state legislative districts and a corresponding increase in black legislators following the 1990 redistricting. In the South, the number of black state senators increased from 43 to 67, and the number of black house members from 159 to 213. David A. Bositis, Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South 46-7 (Joint Center for Political and Economic Studies, 1995).

[9] Since all districting is designed to advance the interests of particular voters or groups, *e.g.*, incumbents, Democrats, farmers, coastal residents, suburbanites, etc., one leading expert has said that "[a]ll districting is 'gerrymandering.' " Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics 462 (1968). In Davis v. Bandemer, 478 U.S. 109, 132 (1986), this Court defined a gerrymander as an electoral arrangement that denies or degrades "a voter's or a group of voters' influence on the political process as a whole."

1996)), New York (*Diaz v. Silver*, 932 F. Supp. 462 (E.D.N.Y. 1996)), Virginia (*Moon v. Meadows*, 952 F. Supp. 1141 (E.D.Va. 1997)), Georgia (*Johnson v. Miller*, 864 F. Supp. at 1359), Illinois (*King v. State Board of Elections*, 979 F. Supp. 582 (N.D.Ill. 1996)), and South Carolina (*Leonard v. Beasley*, Civ. No. 3:96-CV-3540 (D.S.C.)).[10]

This litigation reflected a well established historical pattern. As this Court and others have observed, political mobilization in the black community, particularly in the South, has rarely gone unopposed since Reconstruction onwards. *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966) (noting the adoption by various southern states beginning in 1890 of tests "specifically designed to prevent Negroes from voting"). *See also* J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Part South, 1880-1910* (1974); Paul Lewinson, *Race, Class, and Party: A History of Negro Suffrage and White Politics in the South* (1932); Armand Derfner, "Racial Discrimination and the Right to Vote," 26 Vand. L. Rev. 523 (1973). In modern times the Voting Rights Act, which has been the single most effective tool of black enfranchisement in our nation's history, has

[10] Similar challenges were filed against majority black state legislative districts in South Carolina (Smith v. Beasley, 946 F. Supp. 1174, 1175 (D.S.C. 1996)), Florida (Scott v. United States Dept. of Justice, 920 F. Supp. 1248 (M.D.Fla. 1996)), Texas (Thomas v. Bush, No. A-95-CA 18655 (W.D.Tex.)), Georgia (Johnson v. Miller, 929 F. Supp. 1529 (S.D.Ga. 1996)), Louisiana (Currie v. Foster, No. 97-CV-368 (W.D.La.)), North Carolina (Daly v. High, No. 5:96 CV 86-V (W.D.N.C.)), Ohio (Quilter v. Voinovich, 912 F. Supp. 1006 (N.D.Oh. 1995)), and Alabama (Rice v. Smith, 988 F. Supp. 1437 (M.D.Ala. 1977)).

become a natural lightning rod for this opposition. *See, e.g.*, Frank R. Parker, *Black Votes Count* 34-5 (1987) (describing as a "massive resistance" campaign the efforts by Mississippi's white leadership to blunt the increase in black voter registration after passage of the 1965 Act).[11]

The first of the modern reverse discrimination cases to reach the Court following the 1990 census was *Shaw v. Reno*, a challenge to congressional redistricting in North Carolina and a precursor to this case.[12] In *Shaw*, the Court held that plaintiffs who alleged that districts were "bizarre" or "irrational" in shape, and were "unexplainable on grounds other than race," stated a claim for relief

---

[11] Similar efforts in other southern states to thwart the civil rights acts of 1957, 1960, 1964, and 1965 are discussed in the various state chapters in *Quiet Revolution*.

[12] It is not surprising that the latest backlash erupted in the context of congressional redistricting. The creation of majority black districts for county commissions and city councils, while important at the local level and by no means uncontroversial, lacked the visibility and impact of the creation of majority black districts for Congress. Members of Congress, axiomatically, wield national political power, and the election of blacks to national office is more likely to galvanize attention and opposition. There was also the critical issue of the sheer number of blacks elected to Congress. Courts and social scientists have frequently commented on the "tipping phenomenon," where whites flee a neighborhood or the public schools when the perception takes hold that there has been "too much" integration. *See, e.g.*, A. Leon Higginbotham, Jr., Gregory A. Clarick & Marcella David, "*Shaw v. Reno*: A Mirage of Good Intentions with Devastating Racial Consequences," 62 Ford. L. Rev. 1593, 1632 n.194 (1994). The unprecedented success of black congressional candidates in the 1992 elections was undoubtedly a tipping event for many whites.

under the equal protection clause of the Fourteenth Amendment. 509 U.S. at 643, 658.

Two years later the Court expanded on *Shaw* when it held that a bizarre district shape was not a prerequisite for a constitutional challenge but was simply one way of proving a suspect racial classification or purpose. *See Miller v. Johnson*, 515 U.S. at 911. As the Court explained in *Miller*, a plaintiff could establish

> either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.

Id. at 916. In sum, the plaintiffs' burden under *Miller* is to "show that the State has relied on race in substantial disregard of customary and traditional districting practices." *Id.* at 928 (O'Connor, J., concurring).

Applying the rules in *Shaw* and *Miller*, the Court has struck down majority-minority districts in North Carolina (the 12th) (*Shaw v. Hunt*, 517 U.S. at 918), Georgia (the 11th) (*Miller v. Johnson*, 515 U.S. at 927) (the 2d) (*Abrams v. Johnson*, 521 U.S. at 90), and Texas (the 18th, 29th, and 30th) (*Bush v. Vera*, 517 U.S. at 957). Lower courts have done the same to majority-minority congressional districts in Florida (the 3d) (*Johnson v. Mortham*, 926 F. Supp. at 1495), Virginia (the 3d) (*Moon v. Meadows*, 952 F. Supp. at 1150), Louisiana (the 4th) (*Hays v. Louisiana*, 936

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the equal right of racial and other minorities to participate in the electoral process. Specifically, the ACLU has participated in numerous voting cases before this Court, both as direct counsel, *e.g.*, *McCain v. Lybrand*, 465 U.S. 236 (1984), *Holder v. Hall*, 512 U.S. 874 (1994), *Abrams v. Johnson*, 521 U.S. 74 (1997), and as *amicus curiae*, *e.g.*, *United States v. Hays*, 515 U.S. 737 (1995), *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997).

SUMMARY OF ARGUMENT

Amicus respectfully suggests that this case offers an appropriate occasion for the Court to reconsider its redistricting cases that began with *Shaw v. Reno*, 509 U.S. 620 (1993). Majority-minority districts, which have been challenged systematically in the wake of *Shaw*, have been the key to the increase in black officeholding since passage of

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. This brief was not authored in whole or in part by counsel for a party and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

the Voting Rights Act of 1965. By creating lenient standing rules for white voters and relieving them of the obligation to show that majority-minority districts have been drawn for a discriminatory purpose, *Shaw* and its progeny have transformed the Fourteenth Amendment from a law designed to prohibit discrimination against racial minorities to one that can now be used to dismantle majority-minority districts and allow whites once again to maximize their control of the electoral process.

The majority-minority districts created after the 1990 census were the most racially integrated districts in the country. Not only have they not caused segregation or other racial harm, but they have ameliorated to some extent the affliction of racial bloc voting and have thus bestowed a benefit upon the electorate and society as a whole.

By requiring strict scrutiny of majority-minority districts, the *Shaw* cases have singled out nonwhites for special, discriminatory treatment in the redistricting process. While whites are acknowledged to have a constitutionally protected right to organize politically, the comparable efforts of nonwhites alone are deemed constitutionally suspect. Such a result violates the concept of equal treatment under the Fourteenth Amendment.

Experience has shown that, contrary to this Court's intent, the *Shaw* standards have proven both unworkable and unfair. Legislators no longer know when the consideration of race in redistricting is required, permissible, or impermissible. Because of the absence of clear and reliable standards, the federal courts have been drawn

increasingly and unnecessarily into the redistricting process.

The decision below should be reversed because plaintiffs failed to prove a cognizable injury and that the legislature acted with a discriminatory purpose. To the extent that *Shaw v. Reno* and its progeny are inconsistent with reversal, those decisions should be reconsidered and overruled.

ARGUMENT

I. Introduction

This case provides the Court with an opportunity to reconsider its line of redistricting cases that began with *Shaw v. Reno*.[2] As described more fully below, the *Shaw* cases have created legal and political confusion. Exhibit A for that proposition is the *Shaw* litigation itself. Congressional redistricting in North Carolina has come before this Court four times within the decade. And by the time the Court has rendered a decision, the 2000 census may have triggered another round of redistricting in the state, starting the entire process of legislative enactment and litigation anew.

The problem created by *Shaw* is that legislators and the lower courts no longer know the extent to which race can or should be taken into account in drawing district

---

[2] Cases following *Shaw* include Miller v. Johnson, 515 U.S. 900 (1995), Shaw v. Hunt, 517 U.S. 899 (1996), Bush v. Vera, 517 U.S. 952 (1996), Abrams v. Johnson, 521 U.S. 74 (1997), and Hunt v. Cromartie, 526 U.S. 541 (1999).

lines. Indeed, the most recent decision of the court below has muddied the waters even further by invalidating a district that is not even majority black. The result of the confusion created by the *Shaw* cases has been to draw the federal courts increasingly, and unnecessarily, into the redistricting process.

Shaw and its progeny have also created rules that give special preferences to whites and shackle racial minorities with special disadvantages in redistricting. In the wake of *Shaw* we are witnessing a systematic attack on majority-minority districts, which threatens to erode the gains in minority political participation accumulated so laboriously since passage of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*

This Court has acknowledged that states may legitimately consider race in redistricting for a variety of reasons – to overcome the effects of prior and continuing discrimination, to comply with the Fourteenth Amendment and the Voting Rights Act, or simply to recognize the common interests of communities that have a particular racial or ethnic makeup. *Amicus* submits that, prior to the millennium census and the next round of redistricting, the Court should frankly admit that the *Shaw* cases demand reconsideration, and that federal judicial intrusion in redistricting is warranted only when the creation of majority-minority districts causes cognizable harm, such as the denial or abridgment of the right to vote or participate equally in the electoral process.[3]

---

[3] Two members of the Court have stated or implied that they would abandon *Shaw*. *See* Bush v. Vera, 517 U.S. at 1005 ("I would return to the well-traveled path that we left in *Shaw I*") (Stevens, J., dissenting); *id.* at 1074 ("while I take the commands of *stare decisis* very seriously, the problems with *Shaw* and its progeny are themselves very serious") (Souter, J., dissenting). Where "the lessons of experience" have shown a decision to be wrong or unworkable, the Court has not hesitated to overrule it. United States v. Scott, 437 U.S. 82, 101 (1978).

II. The Voting Rights Act and the Importance of Majority-Minority Districts

On the eve of passage of the Voting Rights Act there were fewer than 100 black elected officials in the entire 11 states of the Old Confederacy. *See* U.S. Commission on Civil Rights, *Political Participation* 15 (1968). By January, 1997 the number had increased to 5,456. *See* Joint Center for Political and Economic Studies, *Black Elected Officials: A Statistical Summary* 9 (1998).[4] This increase was caused primarily by the creation of majority-minority districts pursuant to the preclearance provisions of Section 5 of the Act, 42 U.S.C. § 1973c, and the vote dilution provisions of Section 2 of the Act, 42 U.S.C. § 1973.[5] Any

---

[4] This is not to suggest, however, that blacks in the South hold office in anything approaching their percent of the population. While blacks are 19.2% of the region's population, they are only 6.6% of its elected officials. *Black Elected Officials* at 10.

[5] This Court has recognized the tendency of at-large elections to submerge or dilute the voting strength of cohesive minority communities "by permitting the political majority to elect *all* representatives of the district." Rogers v. Lodge, 458 U.S. 613, 616 (1982). The use of majority-minority districts has been an obvious, and successful, way of countering the debilitating effects of at-large bloc voting by the majority. Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

doubts in that regard were effectively eliminated by publication of *Quiet Revolution in the South* (C. Davidson & B. Grofman eds., 1994), the most comprehensive, systematic study ever undertaken of the Voting Rights Act.[6] In particular, that study supports three critical findings:

> First, the increase in the number of blacks elected to office in the South is a product of the increase in the number of majority-black districts and not of blacks winning in majority-white districts. Second, even today black populations well above 50 percent appear necessary if blacks are to have a realistic opportunity to elect representatives of their choice in the South. Third, the increase in the number of black districts in the South is primarily the result not of redistricting changes based on population shifts as reflected in the decennial census but, rather, of those required by the Voting Rights Act.

Lisa Handley & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations" in *Quiet Revolution* at 335-36.

The impact of the Act has been particularly visible and dramatic at the congressional level. Fifteen new majority-minority congressional districts were created in

[6] *Quiet Revolution* was a collaborative effort by 27 political scientists, historians, and lawyers funded by the National Science Foundation. According to Professor Richard Pildes, *Quiet Revolution* is "[u]tterly free of ideological cant . . . [and] presents the most sober, comprehensive, and significant empirical study of the precise effects of the VRA ever undertaken." Richard H. Pildes, "The Politics of Race," 108 Harv. L. Rev. 1359, 1362 (1995).

the South in the 1980s and 1990s as a result of litigation, the threat of litigation, or the Section 5 preclearance process.[7]

The increase in majority black districts was followed by an increase in black elected officials. Seventeen of the majority-minority congressional districts – and none of the majority white districts – elected a black in 1992. 1990

[7] Vote dilution litigation in the 1980s produced majority black districts in Georgia (the 5th) (Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982)), Louisiana (the 2d) (Major v. Treen, 574 F. Supp. 325, 355 (E.D.La. 1983)), and Mississippi (the 2d) (Jordan v. Winter, 604 F. Supp. 807, 813 (N.D.Miss. 1984)). Similar litigation in the 1990s produced a majority black congressional district in Alabama (the 7th) (Wesch v. Hunt, 785 F. Supp. 1491, 1498-99 (S.D.Ala. 1992)), two in Florida (the 3d and 17th), and a third (the 23d) in which blacks and Hispanics combined were the majority (DeGrandy v. Wetherell, 794 F. Supp. 1076, 1088 (N.D.Fla. 1992)), and one in South Carolina (the 6th) (Burton v. Sheheen, 793 F. Supp. 1329, 1367-69 (D.S.C. 1992)). During the 1990s Section 5 objections, or threatened objections, by the Attorney General also resulted in the creation of two additional majority black districts in Georgia (the 2d and 11th) (Johnson v. Miller, 864 F. Supp. 1354, 1366 (S.D.Ga. 1994)), one additional district in Louisiana (the 4th) (Hays v. Louisiana, 839 F. Supp. 1188, 1196 n.21 (W.D.La. 1993)), and two in North Carolina (the 1st and 12th) (Shaw v. Barr, 808 F. Supp. 461, 464 (E.D.N.C. 1992)). The threat of litigation or objections to preclearance by civil rights organizations was a factor in the creation of a second majority black district in Texas (the 13th) (Vera v. Richards, 861 F. Supp. 1304, 1315 (S.D.Tex. 1994)), and one in Virginia (the 3d). *See* Bill Wasson, "Wilder Plan Expected to Win Assembly OK," The Richmond News Leader, Dec. 3, 1991, p. 1. The two other majority-minority districts in the South were the 9th (majority black) in Memphis, and the 18th (majority black and Hispanic) in Texas. Michael Barone & Grant Ujifusa, The Almanac of American Politics 1974 (1973).

F. Supp. 360, 371 (W.D.La. 1996)), and New York (the 12th) (*Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997)).[13]

There is nothing sinister or unlawful about the desires or efforts of whites to elect candidates of their choice, including candidates of their own race. To the contrary, the "freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 U.S. 51, 56-7 (1973) (*quoting NAACP v. Button*, 371 U.S. 415, 430 (1963)). What *is* indefensible is that under the *Shaw* cases the freedom of whites to associate for the common advancement of political beliefs and ideas, including the right to construct and run in majority white districts, is deemed constitutionally protected, while the comparable efforts of blacks and other nonwhites are deemed constitutionally suspect.

---

[13] Not all the *Shaw/Miller* challenges have succeeded. The Court summarily affirmed without opinion lower court decisions rejecting challenges to congressional plans in California (DeWitt v. Wilson, 515 U.S. 1170 (1995)), and Illinois (King v. Illinois Board of Election, 522 U.S. 1087 (1998)), *aff'g*, 979 F. Supp. 582, 619 (N.D.Ill. 1996), as well as a legislative plan in Ohio (Quilter v. Voinovich, 981 F. Supp. 1032 (N.D.Oh. 1997), *aff'd*, 523 U.S. 1043 (1998). The Court also affirmed the decision of the district court rejecting a challenge to a legislative redistricting settlement in Florida. Lawyer v. Department of Justice, 521 U.S. 567 (1997).

IV. The Shaw /Miller Standards Are Unworkable

The *Shaw/Miller* standards have left legislators in a quandary as to when the consideration of race in redistricting is impermissible, permissible, or required. According to the Court, a legislature may properly "be aware of racial demographics," but it may not allow race to predominate in the redistricting process. *Miller v. Johnson*, 515 U.S. at 916. A state "is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests." *Id.* at 920. Redistricting may be performed "with consciousness of race." *Bush v. Vera*, 517 U.S. at 958. Indeed, it would be "irresponsible" for a state to disregard the racial fairness provisions of the Voting Rights Act. *Id.* at 991-92 (O'Connor, J., concurring). A state may therefore "create a majority-minority district without awaiting judicial findings" if it has a strong basis in evidence for avoiding a Voting Rights Act violation. *Id.* at 994. Even the Court has acknowledged that it "may be difficult" to make and apply such distinctions. *Miller v. Johnson*, 515 U.S. at 916.

The Justices who have disagreed with the Court's new decisions have at various times said that the *Shaw* standards are "unworkable," *Abrams v. Johnson*, 521 U.S. at 116 (Breyer, J., dissenting), *Bush v. Vera*, 517 U.S. at 1074 ("[t]he Court has been unable to provide workable standards") (Souter, J. dissenting), are "a jurisprudential wilderness that lacks a definable constitutional core," *Bush v. Vera*, 517 U.S. at 1005 (Stevens, J., dissenting), and "render[ ] redistricting perilous work for state legislatures,"

Miller v. Johnson, 515 U.S. at 949 (Ginsburg, J., dissenting).[14] The fact that congressional redistricting in North Carolina is now before the Court for the fourth time in seven years is proof of just how unworkable the standards are and how perilous the redistricting process has become.

Moreover, *Shaw*, which was presumably limited to majority-minority districts and instances where a jurisdiction subordinated its traditional redistricting principles to race, was used by the court below to invalidate a majority white district. It is difficult now to know how the rules in *Shaw* can be confined or applied in any principled or reliable way.

Because of the absence of clear and reliable standards the courts have increasingly been drawn into redistricting, which this Court has recognized "is primarily the duty and responsibility of the State through its legislature

---

[14] The views of the dissenters are widely shared by others. *See, e.g.*, Higginbotham, *et al.*, 62 Ford. L. Rev. at 1603 (describing *Shaw* as "obscure"); Frank R. Parker, "The Constitutionality of Racial Redistricting: A Critique of *Shaw v. Reno*," 3 D. Col. L. Rev. 1, 43 (1995) (the *Shaw* standards are "vague and subjective"); Bernard Grofman & Lisa Handley, "1990s Issues in Voting Rights," 65 Miss. L. J. 205, 215 (1995) (*Shaw* "did not establish clearly manageable standards"); J. Morgan Kousser, Colorblind Injustice 368 (1999) ("*Shaw v. Reno* and its successors are revolutionary, contradictory, and incoherent"); T. Alexander Aleinikoff & Samuel Issacharoff, "Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno*," 92 Mich. L. Rev. 588, 651 (1993) ("[a]t the end of the day, *Shaw* remains an enigmatic decision"); Pamela S. Karlan, "All Over the Map: The Supreme Court's Voting Rights Trilogy," 1993 Sup. Ct. Rev. 245.

or other body, rather than of a federal court." *Chapman v. Meier*, 420 U.S. 1, 27 (1975). *Accord, Growe v. Emison*, 507 U.S. 25, 34 (1993). State legislatures "are by far the best situated to identify and then reconcile traditional state policies." *Connor v. Finch*, 431 U.S. 407, 414-15 (1977). Federal courts, by contrast, "possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Id.* at 415. Though the Court often recites its adherence to these principle, *Abrams v. Johnson*, 521 U.S. at 101, it has nonetheless affirmed a court drawn plan in Georgia that had "Interstate Eighty-Five as a very real connecting cable," *Johnson v. Miller*, 922 F. Supp. 1552, 1564 (S.D.Ga. 1995), while declaring unconstitutional a district in North Carolina drawn along the very same highway. *Shaw v. Reno*. Whether or not a major highway is a connecting cable joining communities of interest is precisely the sort of political choice that should be left to state legislatures, and not the federal courts.

Faced with the prospect of being sued for a constitutional violation if they create majority-minority districts and sued for a Voting Rights Act violation if they do not, states will be strongly tempted to leave redistricting to the federal courts.[15] And those that do not will likely end

---

[15] That is what Georgia did. After the remand in Miller v. Johnson, the legislature met in special session to redistrict the Congress. After several weeks of discussion and plan drawing, the legislature adjourned without taking action, leaving redistricting to the federal court. Abrams v. Johnson, 521 U.S. at 78. The chair of the senate reapportionment committee lamented that "[n]obody knows what they're doing." Mark Sherman, "Redrawn Districts Expected To Face Challenge," Atlanta Journal & Constitution, Aug. 2, 1995, p. B6.

up in court anyway. The flood of litigation generated by *Shaw* is itself proof of the accuracy of Justice Breyer's observation that, given the subjective nature of the applicable standards, "[a]ny redistricting plan will generate potentially injured plaintiffs, willing and able to carry on their political battles in a judicial forum." *Abrams v. Johnson*, 521 U.S. at 118 (dissenting).

V. Majority White and Majority Nonwhite Districts; Dual Racial Standards

One principle that does emerge with disturbing clarity from the *Shaw* cases is that they "place at a *dis* advantage the very group, African Americans, whom the Civil War Amendments sought to help." *Abrams v. Johnson*, 521 U.S. at 118 (Breyer, J., dissenting). The Court has never invalidated a majority white district on account of its bizarre shape, or because the jurisdiction subordinated its traditional redistricting principles to race, although there is a long and continuing history of protecting white incumbents through the creation of majority white districts, including those that are highly irregular in shape and disregard "traditional" districting principles.[16]

For example, the *Congressional Quarterly* has described District 4 in Tennessee (96% white) as "a long, sprawling district, extending nearly 300 miles . . . from

[16] Gomillion v. Lightfoot, 364 U.S. 339 (1960), is not to the contrary. In *Gomillion*, the Court held that the redefinition of the city of Tuskegee's boundaries "was not an ordinary geographic redistricting measure" but was subject to challenge because it removed most of the city's black residents denying them "the right to vote in municipal elections." 364 U.S. at 341.

east to west it touches four States – Mississippi, Alabama, Kentucky, and Virginia." Congressional Quarterly, Inc., *Politics in America 1994: 103rd Congress* 1418 (Phil Duncan ed., 1993). The 11th District in Virginia (81% white) has "a shape that vaguely recalls the human digestive tract." *Id.* at 1602. District 9 in Washington (85% white) has a " 'Main Street' [which] is a sixty-mile stretch of Interstate 5." *Id.* at 1635. District 13 in Ohio (94% white) "centers around two distinct sets of communities . . . [t]he Ohio Turnpike is all that connects the two." *Id.* at 1210. Yet no court, even after *Shaw*, has held or suggested that any of these oddly shaped districts is constitutionally suspect.

To the contrary, such majority white districts have always been regarded as immune from challenge under the Court's often stated principle that a regular looking district shape was not a federal constitutional requirement. *See Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973) (district "compactness or attractiveness has never been held to constitute an independent federal requirement"). Even *Shaw v. Reno* acknowledged that a compact district shape was "not . . . constitutionally required," 509 U.S. at 647, an acknowledgment, however, that is difficult to reconcile with the Court's contradictory holding that "reapportionment is one area in which appearances do matter," *id.* at 647, and that the 12th District in North Carolina was subject to challenge because of its non-compact, or "extremely irregular," shape. *Id.* at 642.

In the Texas redistricting case, filed in 1994, the plaintiffs challenged 24 of the state's 30 congressional districts, 18 of which were majority white. *See Vera v. Richards*, 861 F. Supp. at 1309. The district court invalidated just three districts, the only two that were majority black and one

that was majority Hispanic. *Id.* at 1343-44. The court admitted that the other districts were irregular or bizarre in shape, but held that they were constitutional because they were "disfigured less to favor or disadvantage one race or ethnic group than to promote the re-election of incumbents." *Id.* at 1309. Thus, the oddly shaped majority white districts, designed to keep white incumbents in office, were tolerable as "political" gerrymanders, while the oddly shaped majority black districts, designed to provide black voters the equal opportunity to elect candidates of their choice, were intolerable as "racial" gerrymanders.

On appeal, this Court affirmed. According to the Court "political gerrymandering" was not subject to strict scrutiny. *Bush v. Vera*, 517 U.S. 964. For that reason "irregular district lines" could be drawn for "incumbency protection" and "to allocate seats proportionately to major political parties." *Id. See also id.* at 999 ("[d]istricts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one") (Kennedy, J., concurring). Amicus respectfully submits that the creation of a dual standard in redistricting depending on whether a district is majority white or majority nonwhite is inconsistent with fundamental notions of equal protection under the Fourteenth Amendment.

The *Shaw* cases have also established special standing rules to facilitate challenges by white voters to majority-minority districts. The Court has described standing as "an essential and unchanging part of the case-or-controversy requirement of Article III," that includes, among other things, the requirement of "an 'injury in fact' – an

invasion of a legally protected interest which is . . . concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

In *Shaw v. Reno*, however, the plaintiffs "did not claim that the General Assembly's reapportionment plan unconstitutionally 'diluted' white voting strength." *Shaw v. Reno*, 509 U.S. at 641.[17] Even more dramatically, the three-judge court in *Miller* made an express finding that "the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these white voters." *Johnson v. Miller*, 864 F. Supp. at 1370. The lack of a concrete and personal injury should have denied both the *Shaw* and *Miller* plaintiffs standing to bring their cases to federal court.

The Court nonetheless found that the plaintiffs in each case had standing because they alleged that their right to participate in a "color-blind" electoral process had been violated. *Shaw v. Reno*, 509 U.S. at 641; *Miller v. Johnson*, 515 U.S. at 911 (the essence of plaintiffs' equal protection claim is not that their voting strength has been minimized or canceled out, but "that the State has used race as a basis for separating voters into districts"). The injury identified by the Court was in being "stereotyped"

---

[17] Nor, as Justice White pointed out, could they. Whites were 79% of the state's voting age population but a majority in ten (83%) of its 12 congressional districts. Shaw v. Reno, 509 U.S. at 666-67 (White, J., dissenting). One commentator has described the *Shaw* plaintiffs "not as injured parties, but as spoilers, intent on eliminating the new majority-black districts as a matter of principle." Parker, 3 D. Col. L. Rev. at 9.

or "stigmatized" by a racial classification. *Miller v. Johnson*, 515 U.S. at 912; *Shaw v. Reno*, 509 U.S. at 643.

In prior cases involving black plaintiffs, however, the Court held that a similar abstract, hypothetical, or stigmatic injury was *not* sufficient to confer standing to challenge discriminatory governmental action. For example, in *Allen v. Wright*, 468 U.S. 737, 754 (1984), the Court rejected a challenge by blacks to alleged discrimination by the Internal Revenue Service because "stigmatic injury, or denigration" suffered by members of a racial group when the Government discriminates on the basis of race was insufficient harm to confer standing. Allowing standing in the absence of direct injury would, according to the Court, "transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' " *Id.* at 756 (*quoting United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973)).

Shaw and *Miller* have thus established a liberal rule of standing in the absence of direct injury for whites challenging majority-minority districts that is different from the restrictive rule of standing applied to blacks challenging official action as being discriminatory.

In addition, *Shaw* also relaxed the requirement that white plaintiffs prove the state intended to discriminate against them in enacting a challenged redistricting plan. The *Shaw v. Reno* plaintiffs did not claim that the state's plan was enacted for the purpose of diluting white voting strength. 509 U.S. at 641. Indeed, the legislature's admitted purpose in creating majority black districts was the entirely nondiscriminatory one of complying with the

Voting Rights Act. *Id.* at 635, 655. The Court reasoned, however, that even though a districting plan was facially neutral, a racial classification was apparent or "express" where a majority black district had a "bizarre" shape, and that accordingly "[n]o inquiry into legislative purpose is necessary." *Id.* at 642.[18] This is markedly different than the standard applied by the Court in other civil rights contexts.

Since *Washington v. Davis*, 426 U.S. 229 (1976), the Court has required proof of a discriminatory purpose to establish a violation of the Fourteenth Amendment. And in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court applied that rule to the voting context. In setting aside a constitutional challenge by black voters to municipal at-large elections, the Court stressed that "only if there is purposeful discrimination can there be a violation of the Equal Protection Clause." *Id.* at 66. Even proof that black

---

[18] The cases principally relied upon by the Court, Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), and Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), do not support its analysis. In *Arlington Heights*, the Court held that a severe discriminatory impact may support an inference of discriminatory purpose, but that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U.S. at 265. In *Feeney*, in a passage omitted in Shaw v. Reno, the Court held that "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." 442 U.S. at 272. *A fortiori*, the cases relied upon by the Court do not support the proposition that a facially neutral classification that has no discriminatory impact can be unconstitutional absent proof of a discriminatory purpose.

voting strength in the city had been diluted was, according to the Court, "most assuredly insufficient to prove an unconstitutionally discriminatory purpose." *Id.* at 73. *Accord, City of Memphis v. Greene*, 451 U.S. 100, 119 (1981) ("the absence of proof of discriminatory intent forecloses any claim that the official action challenged in this case violates the Equal Protection Clause").

Shaw/Miller's new cause of action based on bizarre district shape, new dual standard depending on whether a district is majority white or non-white, and absence of the requirements of showing a discriminatory purpose and effect now allow the Fourteenth Amendment, which was intended to prohibit discrimination against minorities, *see The Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 81 (1873) (the Fourteenth Amendment was adopted to remedy "discrimination against the negroes as a class, or on account of their race"), to be used to destroy majority-minority districts and deprive blacks of equal political opportunities.

VI. Mistaken Assumptions about Segregation

The underlying premise of the redistricting decisions is that creating nonwhite majority districts is a form of "segregation" which harms individuals and society. *Shaw v. Reno*, 509 U.S. at 641. Under this view, individuals are harmed because of "the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.' " *Miller v. Johnson*, 515 U.S. at 911-12. Society is allegedly harmed because " '[r]acial gerrymandering . . . may balkanize us

into competing racial factions.' " *Id.* As demonstrated below, each of these premises is seriously flawed.

The majority-minority districts in the South created after the 1990 census, far from being segregated, were the most racially *integrated* districts in the country. They contained an average of 45% non-black voters. Bositis, *Redistricting and Representation* at 28. No one familiar with Jim Crow could confuse the highly integrated redistricting plans of the 1990s with racial segregation under which blacks were not allowed to vote or run for office. As Justice Stevens has recognized, plans containing majority-minority districts are a form of "racial integration." *Miller v. Johnson*, 515 U.S. at 932 (Stevens, J., dissenting). Moreover, the notion that majority black districts are "segregated," and that the only integrated districts are those in which whites are the majority, is precisely the sort of race based concept which the Court has consistently deplored.

The premises of *Shaw* and *Miller* are flawed for the further reason that race is not simply an "assumption" or "stereotype." Race is admittedly not a scientific or genetic fact,[19] but it is a social and political fact of American life. *See generally* Nathan Glazer, "Reflections on Citizenship and Diversity," in *Diversity and Citizenship: Rediscovering American Nationhood* (Gary J. Jacobsohn & Susan Dunn eds., 1996). Indeed, it is the acknowledgment of that fact that led Congress to enact the Voting Rights Act. *See South Carolina v. Katzenbach*, 383 U.S. at 337 (describing

---

[19] *See* Critical Race Theory: The Concept of "Race" in Natural and Social Science ix (E. Nathaniel Gates ed., 1997) (scientists are now agreed that "race" has "no scientifically verifiable referents").

the purpose of the Act to insure that "millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live").

Lower courts applying the Act have reached the same conclusion. In *Miller v. Johnson*, for example, the trial court concluded that racial discrimination was such a pervasive feature of life in Georgia that it took judicial notice of it and dispensed with any requirement that it be proved. The district court also acknowledged that, on the basis of existing statewide racial bloc voting patterns, the Voting Rights Act required the creation of a majority black congressional district in the Atlanta metropolitan area to avoid dilution of black voting strength. *Johnson v. Miller*, 922 F. Supp. at 1568. Given the existence of racial bloc voting, treating blacks and whites as often having different voting preferences is to acknowledge reality, not indulge stereotypes.

Nor is there any evidence that majority-minority districts have either caused or increased social or other harm. In 1982, opponents of the amendment of Section 2 claimed that the creation of majority-minority districts would "deepen the tensions, fragmentation and outright resentment among racial groups," Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 662 (1982) (statement of John H. Bunzel), "pit race against race," *id.* at 745 (statement of Michael Levin), "foster polarization," *id.* at 1328 (statement of Donald L. Horowitz), and "compel the worst tendencies toward race-based allegiances and divisions." *Id.* at 1449 (letter from William Van Alstyne). Congress considered and

rejected these claims because there was no evidence to support them. It concluded that the amendment would not "be a divisive factor in local communities by emphasizing the role of racial politics." S.Rep. No. 417, 97th Cong., 2d Sess. at 32-3 (1982). It found there was "an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify." *Id.*[20]

None of the *Shaw* cases, moreover, indicate that any of the theoretical harms suggested by the majority have in fact come to pass. In *Miller v. Johnson*, the witnesses at trial testified without contradiction that the challenged plan had not increased racial tension, caused segregation, imposed a racial stigma, deprived anyone of representation, caused harm, or guaranteed blacks congressional seats. *Johnson v. Miller*, Trial Transcript, Vol. III, p. 268; Vol. IV, pp. 194, 106, 239, 240, 242; Vol. VI, pp. 36, 38, 45, 47, 56, 58, 117, 120. The district court concluded that "the 1992 congressional redistricting plans had no adverse consequences for these white voters." *Johnson v. Miller*, 864 F. Supp. at 1370.

---

[20] In the political sphere, where Congress has "a specially informed legislative competence," this Court has held that its duty is to determine only if there is "a basis upon which Congress might predicate a judgment" that a particular practice was a valid means of carrying out the commands of the Constitution. Katzenbach v. Morgan, 384 U.S. 641, 656 (1966). *Accord*, South Carolina v. Katzenbach, 383 U.S. at 337. There clearly was a basis upon which Congress could conclude that majority-minority districts did not cause social or other harm and were thus a valid means of implementing the Fourteenth and Fifteenth Amendments.

The district court acknowledged as much in *Hays v. Louisiana*. Although holding the state's congressional plan unconstitutional under *Shaw*, the district court nonetheless noted "the great benefits that are derived by an increase in minority representation in government." 862 F. Supp. 119, 128 (W.D.La. 1994) (Shaw, J., concurring). Minority elected officials, the court wrote, "have shown that they perform admirably," that their efforts in government "provide positive role models for all black citizens," and that they "insure that the legal obstacles to minority advancement in all areas of life will be eliminated." *Id.*

In a similar vein, one veteran civil rights lawyer has said that, based on his experience in Mississippi:

> the creation of majority-minority districts and the subsequent election of minority candidates reduces white fear and harmful stereotyping of minority candidates, ameliorates the racial balkanization of American society, and promotes a political system in which race does not matter as much as it did before.

Frank R. Parker, "The Constitutionality of Racial Redistricting: A Critique of *Shaw v. Reno*," 3 D. Col. L. Rev. 1, 19-20 (1995). Indeed, in *Abrams v. Johnson*, 521 U.S. at 93, this Court read into the success of two black incumbents a "general willingness" of whites to vote for blacks. That "general willingness" was without doubt made possible by white exposure to black incumbents, whose election was made possible in the first instance by majority black districts.

VII. The Erroneous Comparison with Affirmative Action

Prior to *Shaw*, the Court frequently noted that one of the essential purposes of redistricting was to "reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups." *Davis v. Bandemer*, 478 U.S. at 147 (O'Connor, J., concurring). For that and other reasons, "legislators necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way." *City of Mobile v. Bolden*, 465 U.S. at 87 (Stevens, J., concurring). *See United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 176 n.4 (1977) ("[i]t would be naive to suppose that racial considerations do not enter into apportionment decisions").

Voting districts have regularly been drawn to accommodate the interests of racial or ethnic groups, such as Irish Catholics in San Francisco, Italian-Americans in South Philadelphia, Polish-Americans in Chicago, and Anglo-Saxons in North Georgia. *See Miller v. Johnson*, 515 U.S. at 944-45 (Ginsburg, J., dissenting); *Busbee v. Smith*, 549 F. Supp. at 502 (in the state's 1980 congressional plan "keeping the cohesive [majority white] mountain counties together was crucial"). The Court specifically rejected a challenge by white voters in 1977 to a New York plan that "deliberately used race in a purposeful manner" to create nonwhite majority state legislative districts in order to comply with the Voting Rights Act. *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. at 165. The Court held that the use of race to insure fairness and

inclusiveness in redistricting did not impose a racial stigma and was proper where white voting strength was not diluted. *Id.* at 179-80.

In requiring strict scrutiny of nonwhite majority districts, *i.e.*, a showing that the districts are "narrowly tailored to achieve a compelling interest," *Miller v. Johnson*, 515 U.S. at 920, the *Miller* majority drew heavily upon the affirmative action cases, indicating that majority-minority districts were simply another form of race based preferences. *Miller v. Johnson*, 515 U.S. at 904.[21] Whether or not one thinks that the affirmative action cases were rightly decided, their application to redistricting ignores the fundamental distinction between the race conscious allocation of limited employment or contractual opportunities and the far different task of reconciling the claims of political, ethnic, racial, and other groups in the redistricting process. *See Shaw v. Reno*, 509 U.S. at 675 ("efforts to remedy minority vote dilution are wholly unlike what typically has been labeled 'affirmative action' ") (White, J., dissenting). If anything, the current challenges to affirmative action only highlight the importance of assuring equal opportunity in the political process.

---

[21] In support of this proposition, *Miller* cited Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (subjecting to strict scrutiny "all racial classifications, imposed by whatever federal, state, or local governmental actor"), City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 494 (1989) (declaring unconstitutional a municipal set aside for minority contractors), and Wygant v. Jackson Board of Ed., 476 U.S. 267, 274 (1986) (invalidating teacher layoff provisions of an affirmative action agreement).

In light of the Court's recent decisions, racial minorities are now the only group that is targeted for special disadvantages in redistricting. White groups of all description – political, religious, occupational, or socio-economic – may organize themselves freely and press for recognition in the redistricting process. The efforts of non-whites alone are subject to the exacting and debilitating standards of strict scrutiny. *See* James U. Blacksher, "Dred Scott's Unwon Freedom: The Redistricting Cases As Badges of Slavery," 39 How. L. J. 633, 634 (1996) ("it is black and Latino citizens alone who may not choose to associate with each other freely and try to optimize their legislative influence in pursuit of a common political agenda") (footnote omitted). Such a result cannot be reconciled with the purposes of the Fourteenth Amendment. As Justice Stevens wrote in *Shaw*:

> If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause.

509 U.S. at 679 (Stevens, J., dissenting).

CONCLUSION

For the reasons stated herein the judgment below should be reversed. To the extent that *Shaw v. Reno* and its progeny are inconsistent with that result, they should be reconsidered.

Respectfully submitted,

LAUGHLIN MCDONALD
Counsel of Record
NEIL BRADLEY
CRISTINA CORREIA
BRYAN SELLS
American Civil Liberties
Union Foundation
2725 Harris Tower
233 Peachtree Street
Atlanta, GA 30303
(404) 523-2721

Counsel for Amicus Curiae